SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No.

THOMAS M. LYNCH, JOHN J. MERRILL AND JOHN P. HENNESSEY, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSIONERS OF THE STATE OF NEW YORK, PETITIONERS,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, UPON THE RELATION OF ELIZABETH PIERSON.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 21, 1934

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IN COURT OF APPEALS OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of ELIZABETH G. PIERSON, Relator-Respondent,

against

THOMAS M. LYNCH, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners Constituting the State Tax Commissioners of the State of New York, Respondents-Appellants

STATEMENT UNDER RULE 234

The above entitled proceeding was commenced on the 26th day of February, 1932, by the service on that day by Messrs. Alexander & Green, as attorneys for Elizabeth G. Pierson, the relator above named, on Thomas M. Lynch, John J. Merrill and John P. Hennessey, as Commissioners constituting the State Tax Commission of the State of New York, the respondents above named, of notice of application, returnable on the 11th day of March, 1932, for an order for a writ of certiorari and for a writ, together with copies of the papers upon which the application was to be made.

Upon the hearing of said application on the 11th day of March, 1932, an order for the issuance of a writ of certiorari was made and entered and the writ entered and served.

[fol. 2] On the 8th day of April, 1932, the return was filed.

The names of the original parties to this proceeding in full and of their respective attorneys are above set forth, and no change in the parties or their attorneys has taken place.

IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

Income Tax for the Year 1928

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of ELIZABETH G. PIERSON, Relator,

against

THOMAS M. LYNCH, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners Constituting the State Tax Commissioners of the State of New York, Defendants

NOTICE OF APPLICATION FOR AN ORDER FOR A WRIT OF CERTIORARI

SIRS: Please take notice that upon the annexed petition of Elizabeth G. Pierson, verified the 11th day of February, 1932, an application will be made on her behalf at a Special [fol. 3] Term of the Supreme Court of the State of New York, in and for the County of Albany, on the 11th day of March, 1932, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for a writ of certiorari directed to Thomas M. Lynch, John J. Merrill, and John P. Hennessey, as Commissioners constituting the State Tax Commission of the State of New York, as prayed in said petition, and for such other and further order or relief as may be proper.

Dated, New York, February 24th, 1932.

Yours, etc., Alexander & Green, Attorneys for Applicant, Office & P. O. Address: No. 120 Broadway, Borough of Manhattan, City of New York, N. Y.

To Thomas M. Lynch, John J. Merrill, and John P. Hennessey, as Commissioners constituting the State Tax Commission of the State of New York.

[fol. 4] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

[Title omitted]

PETITION FOR AN ORDER THAT A WRIT OF CERTIORARI ISSUE

The petition of Elizabeth G. Pierson respectfully shows:

First.—The petitioner is a married woman and at the time hereinafter mentioned resided with her husband in the City, County and State of New York.

Second.—Defendants are the Commissioners constituting the State Tax Commission of the State of New York.

Third.—In April, 1929, petitioner duly made a personal income tax return for the year 1928, pursuant to the Tax Law of New York and Section 367 thereof, and paid to the [fol. 5] Tax Commissioner the amount of tax payable as the same appeared from the face of such return.

Fourth.—Under date of July 14, 1930, the State Tax Commission recomputed petitioner's tax for the year 1928 and assessed petitioner for an additional tax of $76.16 for said year.

Fifth.—On or about September 18, 1930, petitioner duly made application pursuant to Section 374 of the Tax Law for a revision of such assessment, and on or about December 7, 1931, the Tax Commission made its determination denying the same. Copies of said determination and of the affidavit of Charles W. Pierson therein mentioned are hereto annexed, marked Schedule A and Schedule B respectively.

Sixth.—Petitioner is advised and on information and belief alleges that such determination is erroneous and that said assessment is illegal and void and that she is injured and aggrieved thereby, on the grounds that it is computed and imposed upon rental income from real estate situated in Ohio and profit on sale of real estate situated in Ohio and such income and such profit are not taxable by the State of New York and that the tax sought to be imposed thereon would be in substance and effect a tax upon property situated outside the State of New York and would violate petitioner's rights under the Constitution and laws of New York and under the Constitution of the United States and the Fourteenth Amendment thereof.

[fol. 6] Seventh.—Petitioner has heretofore deposited with and paid to the Tax Commission under protest the full amount of the taxes, interest, and other charges audited and stated in such determination and has duly filed an undertaking for costs and charges approved by a Justice of the Supreme Court in compliance with the provisions of Section 375 of the Tax Law.

Eighth.—No previous application for the writ herein sought has been made to any court or judge.

Wherefore, the petitioner prays that the said determination of the State Tax Commission may be reviewed and said assessment vacated and that a writ of certiorari may issue out of this Court to the defendants as Commissioners constituting the State Tax Commission of the State of New York, commanding them to make return to said writ pursuant to law and that the petitioner may have such other and further order or relief as may be proper.

Dated, New York, February 11, 1932.

Elizabeth G. Pierson, Petitioner. Alexander & Green, Attorneys for Petitioner, Office and P. O. Address: No. 120 Broadway, Borough of Manhattan, City of New York, N. Y.

(Verified by Elizabeth G. Pierson, Feb. 11, 1932.)

[fol. 7] SCHEDULE A TO PETITION

THE STATE TAX COMMISSION, STATE OF NEW YORK

In the Matter of the Application for Revision of Income Tax Assessed Against ELIZABETH G. PIERSON for the Year 1928

A return of income on behalf of the above named taxpayer for the calendar year 1928 having been duly filed at the time when required by statute in accordance with the provisions of Article 16 of the Tax Law; and on audit of such return, an additional tax having been found due for such period in the amount of $76.16, which tax was duly assessed under date of July 14th, 1930, assessment notice No. 490501; and the petitioner having duly made application under Section 374 of the Tax Law for a recomputation and revision of such assessment; and the matter having come on for informal hearing at the New York office on July 2nd, 1931, before First Assistant Director Roy H. Palmer and affidavit of Charles W. Pierson having been duly submitted and a formal hearing having been waived, and it appearing that there are no questions of fact but only questions of law involved, now it is

Determined That the computation of the additional tax against the said taxpayer for the year 1928 in accordance with the audit of such return was correct, and that the

additional tax so stated was properly assessed and due; and does not include any taxes or other charges which [fol. 8] should not have been lawfully demanded, and that no payment has been illegally made or exacted thereupon; and that the petitioner is not entitled to any further resettlement of the tax so assessed.

Dated, Albany, N. Y., December 7th, 1931.

The State Tax Commission, (Signed) Thos. M. Lynch, Commissioner; John J. Merrill, Commissioner.

SCHEDULE B TO PETITION

In the Matter of the State Income Tax for 1928 of ELIZABETH G. PIERSON, of 925 Park Avenue, New York City, New York

STATE OF NEW YORK,
County of New York, ss:

Charles W. Pierson, being duly sworn, says:

Deponent is a resident of the State of New York and the husband of Elizabeth G. Pierson, the taxpayer above named.

The taxpayer, who was a resident of the State of Ohio at the time of her marriage, inherited from her father prior to 1928 certain real estate situated at Cincinnati, Ohio. In the year 1928, the taxpayer received rental [fol. 9] income of $2,223.72 from such real estate and a profit on sale of portions of such real estate amounting to $1,584.31. Said income and said profit were not included in her return of taxable income for the year 1928 for the reason, as stated in the return, that she was advised that they were not taxable by the State of New York. The State Tax Commission under date of July 14, 1930, recomputed the tax for the year 1928 and imposed an additional tax of $76.16, being 2% of $3,808.03, the aggregate of said two items.

The taxpayer has made application, pursuant to Section 374 of the Tax Law, for a revision of such additional assessment, alleging in her application that said items of rental income from real estate situated in Ohio and profit on sale of real estate situated in Ohio are not taxable by the State of New York and that a tax imposed thereon by the State

of New York would be in substance and effect a tax upon tangible property situated outside the State and would violate her rights under the laws of New York, the Constitution of the United States, and the Fourteenth Amendment thereof.

(Signed) Charles W. Pierson.

Sworn to before me this 3rd day of July, 1931. R. Damm, Notary Public. Kings County, N. Y. No. 130. Certificate filed in New York County No. 350. Kings County Register's No. 2134. New York County Register's No. 2D-252. Commission expires March 30, 1932. (Notarial Seal.)

[fol. 10] IN SUPREME COURT OF NEW YORK

Present: Honorable F. Walter Bliss, Justice.

ORDER THAT WRIT OF CERTIORARI ISSUE—March 11, 1932

On reading and filing the petition of Elizabeth G. Pierson, verified the 11th day of February, 1932, and the notice of application for an order for a writ of certiorari dated the 24th day of February, 1932, with proof of due service thereof, and it appearing that said Elizabeth G. Pierson has deposited with and paid to the State Tax Commission under protest the full amount of taxes, interest and other charges audited and stated in the determination mentioned and described in said petition, and that she duly filed an undertaking with said State Tax Commission pursuant to the provisions of Section 375 of the Tax Law, and on motion of Alexander & Green, attorneys for the petitioner, it is

Ordered, that a writ of certiorari do issue from and out of this Court directed to Thomas M. Lynch, John J. Merrill, and John P. Hennessey, as Commissioners constituting the State Tax Commission of the State of New York, to review the decision and determination of the said State Tax Commission mentioned and described in the petition and the [fol. 11] questions involving the merits therein mentioned, which writ shall be returnable at the office of the Clerk of the County of Albany within twenty days after service thereof upon the said State Tax Commission of the State of New York.

Enter:

F. Walter Bliss, Justice of the Supreme Court of the State of New York.

IN SUPREME COURT OF NEW YORK

WRIT OF CERTIORARI

Whereas, we have been informed by the petition of Elizabeth G. Pierson, verified the 11th day of February, 1932, that certain proceedings have been had before the State Tax Commission of the State of New York upon the application made on her behalf on or about September 18, 1930, for a revision of the assessment against her made under date of July 14, 1930, of an additional personal income tax of $76.16 for the year 1928, as set forth in said petition, and that the State Tax Commission made its determination dated December 7, 1931, denying the same, and said Elizabeth G. Pierson having now made application to this Court for a writ of certiorari to review said decision and determination of said State Tax Commission, and we, being willing for certain purposes to be certified of such proceed-
[fol. 12] ings, do hereby command and strictly enjoin Thomas M. Lynch, John J. Merrill and John P. Hennessey, as Commissioners constituting the State Tax Commission of the State of New York, that they certify and return the accounts and all the evidence before them upon the application of said Elizabeth G. Pierson for a revision of said assessment, and all the evidence, documents, reports, records, and papers relating thereto at the office of the Clerk of the County of Albany, within twenty days after the service upon them of this writ, pursuant to the provisions of the Tax Law and other requirements of law, so that our Supreme Court may further cause to be done therein what of right and according to law ought to be done, and let the defendants have then and there this writ.

Witness, the Honorable F. Walter Bliss, Justice of this Honorable Court, at the Court House in the City of Albany, New York, this 11th day of March, 1932.

John A. Knox, Clerk. (Albany County Seal.)

Alexander & Green, Attorneys for the Relator, Office & P. O. Address: No. 120 Broadway, Borough of Manhattan, City of New York, N. Y.

This writ is hereby allowed this 11th day of March, 1932.
F. Walter Bliss, Justice of the Supreme Court of the State of New York.

[fol. 13] IN SUPREME COURT OF NEW YORK

RETURN TO WRIT OF CERTIORARI

The above named respondents, obedient to an order and writ of certiorari herein made on March 11, 1932, hereby make return thereto consisting of the accounts and all the evidence before the defendant State Tax Commission, upon the application of the relator herein, for the revision of a certain personal income tax assessment, together with all the evidence, documents, reports, records and papers relating thereto as required by said order and writ of certiorari:

Exhibit 1—Determination by the State Tax Commission, dated December 7, 1931.

Exhibit 2—New York State income tax resident return for the year 1928, executed by Elizabeth G. Pierson.

Exhibit 3—Audit Program A, 1928.

Exhibit 4—Notice of additional assessment of income tax, dated July 14, 1930—Notice No. 490501.

Exhibit 5—Letter dated May 3, 1930, from State Tax Commission to Elizabeth G. Pierson.

Exhibit 6—Letter dated May 6, 1930, from Charles W. Pierson to State Tax Commission.

Exhibit 7—Letter dated September 30, 1930, from State Tax Commission to Elizabeth G. Pierson.

Exhibit 8—Application for revision executed by Charles W. Pierson as Attorney-in-Fact for Elizabeth G. Pierson.
[fol. 14] Exhibit 9—Letter dated January 2, 1931, from Alexander & Green to State Tax Commission.

Exhibit 10—Letter dated January 7, 1931, from State Tax Commission to Alexander & Green.

Exhibit 12—Affidavit of Charles W. Pierson, verified July 3, 1931, together with letter of same date from Charles W. Pierson to State Tax Commission.

Respondents deny each and every allegation in the petition herein except in so far as the same are shown to be true by this return.

Respondents allege that the tax imposed upon plaintiff herein was justly and legally imposed upon her, under the laws of the State of New York.

In witness whereof, the State Tax Commission hereunto sets its hand and seal this — day of April, 1932.

State Tax Commission, Thomas M. Lynch, President; —— ——, Commissioner; John P. Hennessey, Commissioner.

STATEMENT RE EXHIBIT 1—DETERMINATION BY THE STATE TAX COMMISSION, DATED DECEMBER 7, 1931

Printed as Schedule A attached to Petition at page 7.

(Here follows Exhibit 2, side folios 15 & 15a)

EXHIBIT 2—NEW YORK STATE INCOME TAX RESIDENT RETURN FOR THE YEAR 1928, EXECUTED BY ELIZABETH G. PIERSON

8-30-28-800,000 (3-1304)

Long Form No. 201. Page 1 of Return

This return may be used by any resident individual. It is primarily for those engaged in business or profession or having income from rents and gains or losses from sale of property. Non-residents should use Form 203.

NEW YORK STATE INCOME TAX RESIDENT RETURN

For the Calendar Year 1928 or Fiscal Period

begun.....

and ended.....1928

1928

Do not write in these spaces

Amount paid

$ 120.00

CASHIER'S STAMP

No. 106756

RECEIVED
STATE
TAX BUREAU
APR 12 1929
Borough of Manhattan
Teller E

Do not write in these two spaces

PRINT NAME AND RESIDENCE ADDRESS PLAINLY BELOW

NAME: ELIZABETH G. PIERSON
(First name in full—middle initials—last name in full)

RESIDENCE ADDRESS (No.): 925 Park Avenue
(Street or avenue or rural route)

New York City, N.Y.
(City, Village, Post office and State)

FILE AT OFFICE OF THE NEW YORK STATE INCOME TAX BUREAU, 42 NORTH PEARL ST., ALBANY, N. Y., OR AT ANY DISTRICT OFFICE ON OR BEFORE APRIL 15, 1929

READ INSTRUCTIONS CAREFULLY BEFORE PREPARING YOUR RETURN

ANSWER QUESTIONS 1—10 IN FULL

1. Did you file a N. Y. State return for 1926? yes 1927? yes
2. If so, give any address other than that above used on such returns ------
3. If no return for 1927 was filed, state reasons ------
6. Were you married and living with wife or (husband) on the last day of your taxable year? yes
7. If not, were you on the last day of your taxable year the "head of a family" as defined in Instruction D? ----
8. If your status in respect to Questions 6 and 7 changed during the year state the date of such change -----
9. How many dependent persons (other than husband or wife) under

SEE HERE

EXHIBIT 2—NEW YORK STATE INCOME TAX RESIDENT RETURN FOR THE YEAR 1928, EXECUTED BY ELIZABETH G. PIERSON

8-30-28-600,000 (3-1204)

This return may be used by any resident individual. It is primarily for those engaged in business or profession or having income from rents and gains or losses from sale of property. Non-residents should use Form 203.

Long Form No. 201. Page 1 of Return

NEW YORK STATE INCOME TAX RESIDENT RETURN

For the Calendar Year 1928 or Fiscal Period

begun 1928

and ended .....

1928

Do not write in this space. Amount paid $ 126.10

CASHIER'S STAMP

No. 106756

RECEIVED TAX BUREAU APR 12 1929 Borough of Manhattan Teller E

Do not write in these two spaces

PRINT NAME AND RESIDENCE ADDRESS PLAINLY BELOW

NAME: ELIZABETH G. PIERSON (First name in full—middle initials—last name in full)

RESIDENCE ADDRESS (No.): 925 Park Avenue (Street or avenue or rural route)

New York City, N.Y. (City, Village, Post office and State)

FILE AT OFFICE OF THE NEW YORK STATE INCOME TAX BUREAU, 42 NORTH PEARL ST., ALBANY, N. Y., OR AT ANY DISTRICT OFFICE ON OR BEFORE APRIL 15, 1929

READ INSTRUCTIONS CAREFULLY BEFORE PREPARING YOUR RETURN

ANSWER QUESTIONS 1—10 IN FULL

1. Did you file a N. Y. State return for 1926? yes 1927? yes
2. If so, give any address other than that above used on such returns ------
3. If no return for 1927 was filed, state reasons ------
4. Is this a joint return of the income of husband and wife? no
5. If not, and your wife (or husband) filed a separate return, give name and address on such return Charles A. Pierson, 925 Park Avenue, New York City.
6. Were you married and living with wife or (husband) on the last day of your taxable year? yes
7. If not, were you on the last day of your taxable year the "head of a family" as defined in Instruction D? ----
8. If your status in respect to Questions 6 and 7 changed during the year state the date of such change ------
9. How many dependent persons (other than husband or wife) under eighteen years of age, or mentally or physically defective, were receiving their chief support from you on the last day of your taxable year? none
10. What is the relationship to you of the dependent persons for whose support you claim exemption under Questions 7 and 9? ------

ATTACH REMITTANCE HERE

NON-TAXABLE INCOME

11-13. Enter here all income received during the taxable year 1928, not reported on page 2. (See Instruction E)

N.Y. City Bond	$ 42 50		$
	$		$
	$		$
	$		$
	$		$

CALCULATION OF TAX

		Amount of Income Taxable at each Rate	Rate of Tax	Amount of Tax
14. Net income as shown by Item 35 (Page 2 of Return)	$ 11,324 65	$ 10000 00	17. 1% on first $10,000 of Item 16.	$ 100 --
15. *Less* personal exemptions (See Instruction D)	none	1324 65	18. 2% on next $40,000 of Item 16.	2650
			19. 3% on amount over $50,000 of Item 16	----
16. Balance SUBJECT TO TAX (Item 14 minus Item 15)	$ 11,324 65	$ 11324 65	20. TOTAL	$ 12650

THE TAX MUST BE PAID IN FULL ON FILING RETURN—Make checks or money orders payable to STATE TAX COMMISSION (DO NOT SEND CURRENCY BY MAIL. POSTAGE STAMPS WILL NOT BE ACCEPTED IN PAYMENT OF TAX).

AFFIDAVIT STATE OF NEW YORK—COUNTY OF New York, ss.:

I swear (or affirm) that to the best of my knowledge and belief, the statements contained in this return, including the accompanying schedules and statements (if any) are true, and this return is a true and complete statement, in accordance with the law and regulations, of all income, gains and profits received by or accrued to me (or the person for whom this return is made) during the taxable year 1928, and that all deductions entered or claimed herein are allowable under the law and regulations.

Sworn to and subscribed before me this 10th day of April 1929

Elizabeth G. Pierson (Signature of individual or agent)

E. L. Henderson (Title) Notary Public

(Address of agent)

(Signature of officer administering oath and title)

COMMISSION EXPIRES MARCH 30, 1929

[201] [1928]

10A

RETURN OF TAXABLE INCOME

Include income of wife (or husband) and earnings of dependent minor children, unless reported in separate returns.

21. INCOME FROM PERSONAL SERVICES (Salaries, Wages, Fees, Commissions, Bonuses, etc.)

Show the gross amount received (or accrued); if deductions therefrom are claimed, report them at Item 31.
Do not include compensation paid by the United States.
See Instruction 21.

(a) OCCUPATION OR TRADE	(b) NAME AND ADDRESS OF EMPLOYER	AMOUNT
None		$

22. INCOME FROM INTEREST

Report interest received (or accrued) and collectible matured coupons.
Include interest on municipal or state bonds other than municipal or state bonds of the State of New York, on such interest is taxable.
Include exempt interest (See Instruction E.)

Interest (bonds or other corporate obligations; bank deposits, mortgages, notes, etc.) ..... $ 3,174.26

23. INCOME FROM DIVIDENDS

Explain valuation of dividends received other than in cash.
See Instruction 23.

(a) Received in cash ..... $ 6,866.52

(b) Received in property (other than true stock dividends) ..... None .....

24. INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS

Report your entire share (whether distributed or not) of the profits of the partnership (including salary and interest) or of the income of the estate or trust, not merely the amount withdrawn by or paid to you.

Give name and address of partnership, estate or trust. If estate or trust, give also name and address of fiduciary.

(a) Citizens Nat. Bank & Trust Co., $ 880.00

(b) Cincinnati, Ohio

25. INCOME FROM BUSINESS OR PROFESSION (Including Farming) See Instruction 25

Enter here your net income from business or profession, Item 35 of Schedule A. Net income (or loss) from farming operations as computed on Farm Schedule, Form 201, or other schedule used in lieu thereof, should be entered here, and such schedule attached to this return.

Net income from business or profession as shown on Schedule A, or on farm schedule, hereto attached ..... None ..... $
(If a loss, enter in red ink and subtract)

26. INCOME FROM RENTS AND ROYALTIES (See Instruction 26)

(a) KIND OF PROPERTY AND LOCATION	(b) GROSS AMOUNT OF RENTS AND ROYALTIES	(c) REPAIRS, DEPRECIATION AND DEPLETION (explain in Schedule B)	(d) TAXES	(e) INTEREST AND OTHER EXPENSES (explain principal items in Schedule C)

26 NONE: Am advised that rents from real estate situated in Cincinnati, Ohio, ($2223.72) reported in Federal Income Tax return are not taxable in the state of New York.

(1) NET INCOME FROM RENTS AND ROYALTIES (Column b, less total of columns c, d and e). If net loss, enter in red ink and subtract. $ | $ | $ | $ | $

27. PROFIT (OR LOSS) FROM SALE OR EXCHANGE OF STOCKS OR BONDS (Not dealt in as a business and not included in Item 25). See Instruction 27

First fill out Schedule E; then enter here the amount of gain or loss shown thereon.

$ 843.58
(If a loss, enter in red ink and subtract)

28 NONE: Am advised that profits from sale of real estate situated in Cincinnati, Ohio, ($1584.31) reported in Federal Income Tax return are not taxable by the State of New York.

or loss to convey.
(If a loss, enter in red ink and subtract)

29. OTHER INCOME (Describe each source separately and in full)

Do not report exempt income here or income from sources described in Items 21-28, inclusive.

(a) Interest on U.S. Income Tax refund $ 9.09

(b)

30. TOTAL INCOME FROM ABOVE SOURCES (Items 21 to 29 inclusive) ..... $ 11,773.45

31. DEDUCTIONS

(a) Interest on indebtedness ..... None ..... $

(b) Taxes on real property (except assessments for local benefits) .... None .....

(c) Other taxes (except income and inheritance taxes). State character and amount of each 26.60
Personal Tax

OTHER DEDUCTIONS (Describe each separately and in full)

(d) None

(e)

32. TOTAL DEDUCTIONS (except contributions) ..... $ 26.60

33. BALANCE (Item 30 minus Item 32) ..... $ 11,746.85

34. CONTRIBUTIONS (See Instruction 34). These must not exceed 15% of Item 33. Submit details on Schedule D, page 3 ..... 422.00

35. NET INCOME SUBJECT TO TAX (Item 33 minus Item 34) *Enter on page 1, Item 14* ..... $ 11,324.85

1015

[fol. 16] EXHIBIT 3—AUDIT PROGRAM A, 1928

Form 320-A (Revised)
New York State
Income Tax

Audit Division

Audit Program—A
Individual Tax Return
Name Pierson, Elizabeth G.
Address 925 Park Ave.,
Code N. Y. C.

1928

Information Reports Received and Checked Against Return

Item of return	No. of reports	Amount reported	Amount on return	Remarks
.....	$.....	$.....	$.....	.....
.....	$.....	$.....	$.....	.....
.....	$.....	$.....	$.....	.....
.....				

2 ..... Notes of Items to Be Questioned .....
Item No ..... Comment .....

15	Ex OK—	
26	Unless a non-resident, this appears to be taxable income	$2223.72
28	Likewise profit from sale of R. E.	1584.31
		$3808.03
	2% Assess.	$76.16

(Husband takes $4,000 ex.)

3. Income Tax return audited:

(a) Tax due ..... Amount $76.16 Taxpayer notified ..... (No.) ..... (Date)

(b) Refund due ..... Amount $.... Taxpayer notified ..... (No.) ..... (Date)

Approved: Date 7/10/30. W. A. D., Unit Chief.

Cantin, Auditor.

(Here follows Exhibit 4, side folios 17 & 17a)

EXHIBIT 4—NOTICE OF ADDITIONAL ASSESSMENT
TAX, DATED JULY 14, 1930—NOTICE NO. 49

Form No. 321-23
New York State
Income Tax

NEW YORK STATE-DEPARTMENT OF TAXATION AND
INCOME TAX BUREAU
NOTICE OF ADDITIONAL ASSESSMENT OF IN

ORIGINAL

ALBANY, N. Y.

Date JU

Against

Elizabeth G. Pierson
925 Park Avenue
New York City

53583

The audit of your State income tax return for 1928 discloses additional

Explanation:

Rental income -	$2223.72
sale of real estate -	1584.31
a total of -	3808.03
taxable income. Tax due at 2% -	

WAD.G

If not paid within ten days from date hereof there shall be added to the amount of this assessment 5% interest at 1% per month for each month or fraction of a month from the date of this notice. (See Tax L

The foregoing tax is hereby assessed as indicated herein.

THE ST

PAYMENT MAY BE MADE AT ANY OFFICE OF THE NEW YORK STA
MAKE CHECKS PAYABLE TO THE STATE TAX COMMIS

EXHIBIT 4—NOTICE OF ADDITIONAL ASSESSMENT OF INCOME TAX, DATED JULY 14, 1930—NOTICE NO. 490501

Form No. 321-33
New York State Income Tax

NEW YORK STATE-DEPARTMENT OF TAXATION AND FINANCE
INCOME TAX BUREAU
NOTICE OF ADDITIONAL ASSESSMENT OF INCOME TAX

No._____

ORIGINAL

ALBANY, N. Y.

RECEIVING STAMP

No.

Date JUL 14 1930

Against

Elizabeth G. Pierson
925 Park Avenue
New York City

53583

YOU MAY KEEP THIS NOTICE

Payment must be made within ten days

7 & 17a)

The audit of your State income tax return for 1928 discloses additional tax due from you as stated below:

Explanation:		Amount of tax due
Rental income -	$2223.72 and profit on	
sale of real estate -	1584.31	
a total of -	3808.03 is considered	
taxable income. Tax due at 2% -		$76.16

WAD.G

If not paid within ten days from date hereof there shall be added to the amount of this assessment 5% thereof, and in addition, interest at 1% per month for each month or fraction of a month from the date of this notice. (See Tax Law, Sec. 377, Subdiv. 3)

The foregoing tax is hereby assessed as indicated herein.

THE STATE TAX COMMISSION

PAYMENT MAY BE MADE AT ANY OFFICE OF THE NEW YORK STATE INCOME TAX BUREAU
MAKE CHECKS PAYABLE TO THE STATE TAX COMMISSION

Form No. 321-23
New York State Income Tax

NEW YORK STATE-DEPARTMENT OF TAXATION AND FINANCE

490501

INCOME TAX BUREAU

NOTICE OF ADDITIONAL ASSESSMENT OF INCOME TAX

No._____

FOURTH COPY
(To remain in return folder)

ALBANY, N. Y.

Date JUL 14 1930

Stop on 12/7/31 - A. J.

Against

Elizaboth G. Pierson
925 Park Avonuo
New York City

55565

The audit of your State income tax return for 1928 discloses additional tax due from you as stated below:

Explanation:	Amount of tax due
Rontal income - 2223.72 and profit on sale of real estate - 1504.31 a total of - 3728.03 is considered taxable income. Tax due at 2% -	70.16

PP-SP 53
1/3/31

If not paid within ten days from date hereof there shall be added to the amount of this assessment 5% thereof, and in addition, interest at 1% per month for each month or fraction of a month from the date of this notice. (See Tax Law, Sec. 377, subdiv. 3)

not paid
NOV - 7 1930

[fol. 18] EXHIBIT 5—LETTER DATED MAY 3, 1930, FROM STATE TAX COMMISSION TO ELIZABETH G. PIERSON

Letterhead of Department of Taxation and Finance

May 3, 1930.

Elizabeth G. Pierson, 925 Park Avenue, New York City.

DEAR MADAM: A resident of the State of New York is taxable on his income from all sources with the exception of that specifically exempted by Statute. The income you exclude and receive from property rented as well as the profits from sale of real estate are fully taxable. It is requested, therefore, that you provide the details of the rental income as per Item 26 and supporting schedules thereof and the details of the sale of real estate as called for in Schedule F of Form 201 enclosed herewith.

A reply is requested within ten days, referring to Division 44—File 53583.

Very truly yours, State Tax Commission, by Roy H. Palmer, Assistant Director, Chief Audit Division, Income Tax Bureau.

RHD:CM.
Enc. Form—201.
1928.

[fol. 19] EXHIBIT 6—LETTER DATED MAY 6, 1930, FROM CHARLES W. PIERSON TO STATE TAX COMMISSION

May 6, 1930.

State Tax Commission, Albany, N. Y. Division 44—File 53583.

Elizabeth G. Pierson Income Tax 1928

DEAR SIRS: I have before me your letter of May 3, 1930, signed by Roy H. Palmer, Assistant Director, Chief—Audit Division, Income Tax Bureau addressed to my wife Elizabeth G. Pierson, on whose behalf I prepared and filed a return for the purposes of the 1928 income tax.

The return as filed stated that certain rents from real estate situated in Ohio and certain profits from the sale

of real estate situated in Ohio were not included as the taxpayer was advised that they were not taxable. Your letter states that:

"A resident of the State of New York is taxable on his income from all sources with the exception of that specifically exempted by Statute. The income you exclude and receive from property rented as well as the profits from sale of real estate are fully taxable."

In reply I would respectfully submit that the items in question are not taxable in New York for the following reasons:

[fol. 20] A state may not tax tangible property having a situs outside the state.

Union Transit Co. v. Kentucky, 199 U. S. 194;
Hoyt v. Commissioners of Taxes, 23 N. Y. 224.

A tax upon the rents of real estate or the proceeds of the sale of real estate is in substance a tax upon the real estate.

Pollock v. Farmers Loan & Trust Co., 157 U. S. 429, 580, et seq.; 158 U. S. 601, 629.

It must be borne in mind that the question here relates to tangible property and not to choses in action, as to which the maximum mobilia sequuntur personam would of course apply.

If the Department can refer me to any controlling decision holding that the State of New York can tax the income of tangible property situated in another state the additional data requested will be furnished and the additional tax will be paid without question.

Yours respectfully, Charles W. Pierson.

CWP:LS.

[fol. 21] EXHIBIT 7—LETTER DATED SEPTEMBER 30, 1930, FROM STATE TAX COMMISSION TO ELIZABETH G. PIERSON

Letterhead of Department of Taxation and Finance

Sept. 30, 1930.

Elizabeth G. Pierson, 925 Park Ave., New York City.

Re Additional Assessment #490501—1928

DEAR MADAM: This acknowledges receipt of an application for revision of the above assessment.

Pursuant to request contained therein, you are advised that arrangements for an informal hearing should be made by you by communicating with Mr. Wesley M. Dawson, District Director, 220 West 40th Street, New York City, Telephone Longacre 5701, who has charge of the calendar of hearings. The hearing will be held at such time as Deputy Commissioner Wilber and the writer are in New York City.

In connection with the action taken on audit, you are advised at this time that under the very clear provisions of the New York State Income Tax Law a resident of New York is taxable on the total amount of income derived from all sources whether within or without the State and income from rents and profits on the sale of real estate located outside of New York State were correctly included in the computation of your net income as adjusted.

Very truly yours, State Tax Commission, by Roy H. Palmer, Assistant Director, Chief Audit Division, Income Tax Bureau.

JJR:MC.

[fol. 22] EXHIBIT 8—APPLICATION FOR REVISION EXECUTED BY CHARLES W. PIERSON AS ATTORNEY-IN-FACT FOR ELIZABETH G. PIERSON

In the Matter of the State Income Tax for 1928 of ELIZABETH G. PIERSON of 925 Park Avenue, New York City, New York

Elizabeth G. Pierson, residing at 925 Park Avenue, in the City and State of New York, whose State income tax for the year 1928 has been recomputed by the State Tax Commission and an additional tax of $76.16 assessed, hereby makes application for revision of such additional assessment and requests the Tax Commission to grant a hearing thereon pursuant to Section 274 of the Tax Law.

The facts are as follows:

Your petitioner, who was a resident of the State of Ohio at the time of her marriage to Charles W. Pierson, a resident of New York, inherited from her father, a resident of Ohio, prior to 1928 certain real estate situated at Cincinnati, Ohio. In the year 1928 your petitioner received rental income of $2,223.72 from such real estate and a profit

on sale of portions of such real estate amounting to $1,584.31. Said income and said profit were not included in your petitioner's return of taxable income for the year 1928 for the reason, as stated on the face of said return, that your petitioner was advised that they were not taxable [fol. 23] by the State of New York. The State Tax Commission under date of July 14, 1930, recomputed your petitioner's tax for the year 1928 and imposed an additional tax of $76.16, being 2% of $3,803.13, the aggregate of said two items.

Your petitioner respectfully contends that said items of rental income from real estate situated in Ohio and profit on sale of real estate situated in Ohio are not taxable by the State of New York and that a tax imposed thereon by the State of New York would be in substance and effect a tax upon tangible property situated outside the State and would violate the rights of your petitioner under the laws of New York, the Constitution of the United States, and the Fourteenth Amendment thereof.

It is requested that if practicable the hearing herein applied for be held for convenience in the City of New York.

Respectfully submitted, Elizabeth G. Pierson, Petitioner, by Charles W. Pierson, Her Attorney in fact.

[fol. 24] EXHIBIT 9—LETTER DATED JANUARY 2, 1931, FROM ALEXANDER & GREEN TO STATE TAX COMMISSION

January 2, 1931.

State Tax Commission, Department of Taxation and Finance, Albany, N. Y.

Re Elizabeth G. Pierson—Income Tax 1928 Your Subject #490501

DEAR SIRS: Our client Elizabeth G. Pierson is in receipt of your letter dated December 29, 1930, signed by Cortland A. Wilbur, Deputy Commissioner, demanding payment of an additional assessment of income tax for 1928 amounting with interest to $84.53, and stating that unless payment is made within ten days "I shall immediately cause a warrant to be issued or the matter turned over to the Attorney General for action" etc.

As this additional assessment involves an important constitutional question and an application for revision is pending, we had assumed that payment would not be exacted pending the hearing and determination of the application. However, in view of the threat contained in your letter we herewith enclose the taxpayer's check to the order of the State Tax Commission for $84.53.

Please take notice that this payment is made under duress and compulsion and under protest and without prejudice to the pending application for revision or to the taxpayer's rights to recover back the amount so paid.

Yours respectfully, (Sgd.) Alexander & Green.

CWP:LS.
Encl.

[fol. 25] EXHIBIT 10—LETTER DATED JANUARY 7, 1931, FROM STATE TAX COMMISSION TO ALEXANDER & GREEN

Letterhead of Department of Taxation and Finance

January 7, 1931.

Alexander & Green, 120 Broadway, New York City.

Re Assessment 490501—1928 Issued Against Elizabeth G. Pierson

GENTLEMEN: Reference is made to your letter dated January 2, 1931, enclosing check for $84.53 which is herewith credited as a payment in satisfaction of the additional tax assessed against the above individual.

Your protest has been made a matter of record and if it ultimately appears that the assessment or any portion thereof is in error, proper adjustment will be made.

Very truly yours, State Tax Commission, by Roy H. Palmer, Assistant Director, Chief Audit Division, Income Tax Bureau.

JJR.G.

[fol. 26] EXHIBIT 12—AFFIDAVIT OF CHARLES W. PIERSON, VERIFIED JULY 3, 1931, TOGETHER WITH LETTER OF SAME DATE FROM CHARLES W. PIERSON TO STATE TAX COMMISSION

The affidavit of Charles W. Pierson, verified July 3, 1931, is printed as Schedule B attached to petition at page 8. Letter from Charles W. Pierson to State Tax Commission, dated July 3, 1931, is as follows:

July 3, 1931.

State Tax Commission, Department of Taxation and Finance, Albany, N. Y.

Attention of Roy H. Palmer, Esq., Assistant Director, Chief Audit Division Income Tax Bureau

Re Assessment 490501—1928—Issued Against Elizabeth G. Pierson

DEAR SIRS: As suggested by Mr. Palmer at the hearing before him on July 2, 1931, I have made and herewith enclose an affidavit in the above matter, which I trust will be found acceptable for the purposes of a stipulation as to the facts.

Yours respectfully, (Sd.) Charles W. Pierson.

CWP:LS.
Encl.

[fol. 27] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

THE PEOPLE OF THE STATE OF NEW YORK, ex rel. ELIZABETH G. PIERSON, Relator,

vs.

THOMAS M. LYNCH and Others, Constituting the STATE TAX COMMISSION, Respondents

DECISION

Determination annulled, and matter remitted, with fifty dollars costs and disbursements, with direction to fix the income tax in accordance with the opinion.

Opinion by Hill, P. J.

All concur, except Rhodes and Bliss, JJ., who dissent and vote to confirm.

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

OPINION OF HILL, P. J.

HILL, P. J.:

Relator is a resident of the State of New York and the owner of real prope-ty in Cincinnati, Ohio. The State Tax Commission has determined that a rental of $2233.72 received from the real property in 1928, and $1584.31 profit [fol. 28] upon the sale of a portion thereof in that year, should be included as a part of relator's income for the purpose of computing her income tax in this state. The determination is reviewed by certiorari.

"An annual tax upon the annual value or annual user of real estate appears to be the same in substance as an annual tax upon the real estate which would be paid out of the rent or income" (Pollock v. Farmer's Loan & Trust Co., 157 U. S. 429, 581). "In this Court the presently approved doctrine is that no state may tax anything not within her jurisdiction without violating the Fourteenth Amendment. State Tax on Foreign-Held Bonds, 15 Wall. 300; Union Refrig. Transit Co. v. Kentucky, 199 U. S. 194; Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83." (Farmers' Loan & Trust Co. v. State of Minnesota, 280 U. S. 204, 210). "Taxation at the place of domicile of tangibles located elsewhere has been thought to be beyond the jurisdiction of the state" (Lawrence v. State Tax Commission of Mississippi, 286 U. S. 276, 280). The same opinion (p. 281) also speaks of "the rule now established that tangibles located outside the state of the owner are not subject to taxation within it". "Tangible personal property permanently located beyond the owner's domicile may not be taxed at the latter place." (Safe Deposit & Trust Co. of Baltimore, Md. v. Commonwealth of Virginia, 280 U. S. 83, 93). Analogy between tangible personal property with a fixed situs and real property, would sustain the application of the same rule as to each. The rental income from this real property located in Ohio may not be included by the [fol. 29] State of New York as a part of relator's income for the purposes of the income tax.

A different question is presented as to the item representing a profit upon the sale of a part of the real estate located in Ohio. "The tax upon profits made upon purchases and sales is an excise upon the result of the combination of sev-

eral factors, including capital investment and, quite generally, some measure of sagacity; the gain may be regarded as 'the creation of capital, industry and skill' " (Willcuts v. Bunn, 282 U. S. 216, 228).

The income tax of the relator should be fixed by deducting from the income the sum of $2233.72, the amount received as rentals from the real property in Ohio.

The determination of the State Tax Commission should be annulled and the proceedings remitted to it, with the direction to fix the income tax in accordance with this opinion.

[fol. 30] In Supreme Court of New York, Appellate Division

Present: Honorable James P. Hill, Presiding Justice; Honorable Leon C. Rhodes, Honorable Daniel V. McNamee, Honorable John C. Crapser, Honorable F. Walter Bliss, Associate Justices.

The People of the State of New York, Upon the Relation of Elizabeth G. Pierson, Relator,

against

Thomas M. Lynch, John J. Merrill and John P. Hennessey, as Commissioners Constituting the State Tax Commissioners of the State of New York, Respondent

Order Appealed From—Filed May 1, 1933

The Relator, Elizabeth G. Pierson, having applied to this Court for the review by certiorari of a determination of the State Tax Commission assessing an additional income tax against the Relator for the year 1928 in the sum of $76.16, being two per cent of $2,223.72, rental income received from real property situated in Ohio, and $1,584.31, profit on sale of [fol. 31] real property situated in Ohio, and the said proceeding having duly come on to be heard at the Term of this Court commencing on the 17th day of January, 1933, and after hearing Charles W. Pierson of Counsel for said Relator in support of said application, and Joseph M. Mesnig of Counsel for the Respondents in opposition thereto, and due deliberation having been had, it is hereby

Ordered, adjudged and decreed that the determination of the State Tax Commission be and the same hereby is annulled, Mr. Justice Rhodes and Mr. Justice Bliss dissenting and voting to confirm, and that the proceeding be and the same hereby is remitted to said State Tax Commission with the direction to fix the additional income tax assessed against the relator herein by deducting from relator's taxable income as determined by said State Tax Commission the sum of $2223.72, that being the amount received by relator as rentals from real property situated in Ohio, and cancelling the tax of $44.47 assessed by them against such rentals, and that the additional income tax assessed against the relator for the calendar year 1928 be and the same hereby is fixed at the sum of $31.69, and that relator recover $50.00 costs and her disbursements in this proceeding.

John S. Herrick, Clerk.

A copy. John S. Herrick, Clerk. (L. S.)

Entered: John S. Herrick, Clerk.

[fol. 32] Approved as to form.

John J. Bennett, Jr., Attorney General, Attorney for Respondents.

Filed and Ent. 5/1/33.

In Supreme Court of New York, Appellate Division, Third Department

[Title omitted]

Notice of Appeal to Court of Appeals

Please take notice that the constituent members of the State Tax Commission, the Appellant above named, hereby appeal to the Court of Appeals from an order of the Appellate Division, Third Department, made herein and entered on or about the 2nd day of May, 1933, and filed in the Albany County Clerk's Office on or about the 2nd day of May, 1933, which order annulled the determination of the [fol. 33] State Tax Commission reviewed herein; and they hereby appeal from each and every part of said order of annulment and from any judgment entered in pursuance thereof, except in so far as the said order appealed from

confirms and sustains an additional assessment of income tax against the relator herein in the sum of $31.69, computed upon profits arising from the sale of real property situated without the State of New York.

Dated Albany, N. Y., May 4, 1933.

John J. Bennett, Jr., Attorney General, Attorney for Respondents-Appellants, Office and P. O. Address: The Capitol, Albany, N. Y.

To Alexander & Green, Esquires, Attorneys for Relator-Respondent. John S. Herrick, Esquire, Clerk of the Appellate Division of the Supreme Court, Third Department, Albany, N. Y. John A. Knox, Esquire, Clerk of the County of Albany, Albany, N. Y.

[fol. 34] STIPULATION WAIVING CERTIFICATION

Pursuant to §170 of the Civil Practice Act, it is hereby stipulated that the foregoing are true and correct copies of the original petition for writ of certiorari, order for issuance of writ, writ and return thereto and of the whole thereof, and include all the accounts and all the evidence before the State Tax Commission upon the application of Elizabeth G. Pierson, to revise and resettle the accounts hereinbefore audited and stated by the said State Tax Commission against said Elizabeth G. Pierson for annual income tax, under the Tax Law, for the year 1928, all the papers and proofs upon the original statements of said accounts and all proceedings thereon, and also true and correct copies of the opinion of the Appellate Division, Third department, herein, the decision of the Appellate Division, Third Department, the order entered thereupon and here appealed from and the notice of appeal to the Court of Appeals; and certification thereof, as required by §616 of the Civil Practice Act or otherwise, is hereby waived, and it is further stipulated and consented that the same be filed in the office of the Clerk of the Court of Appeals.

Dated Albany, N. Y., July 15, 1933.

Alexander & Green, Attorneys for Relator-Respondent. John J. Bennett, Jr., Attorney General, Attorney for Respondent-Appellant.

Clerk's Certificate to transcript omitted in printing.

[fol. 35] IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, Held at Court of Appeals Hall, in the City of Albany, on the 21st day of November in the Year of Our Lord One Thousand Nine Hundred and thirty-three, Before the Judges of Said Court

Witness, the Hon. Cuthbert W. Pound, Chief Judge, presiding. Wm. J. Armstrong, Clerk.

REMITTITUR—November 22, 1933

Dec. 9, 1933. Ellis J. Staley. J. S. C.

[fol. 36] THE PEOPLE, &c., ex Rel. ELIZABETH G. PIERSON, Respondent,

ag'st

THOMAS M. LYNCH & o'rs, as Commissioners Constituting the STATE TAX COMMISSIONERS OF THE STATE OF NEW YORK, Appellants

Be it remembered, that on the 19th day of July, in the year of our Lord one thousand nine hundred and thirty-three, Thomas M. Lynch and others, as commissioners, &c., the appellants in this cause, came here unto the Court of Appeals, by John J. Bennett, Jr., Attorney General, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Elizabeth G. Pierson, the respondent in said cause, afterwards appeared in said Court of Appeals by Alexander & Green, her attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 37] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Joseph M. Mesnig, of counsel for the appellants, and by Mr. Charles W. Pierson, of counsel for the respondent, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

[fol. 38] Therefore, It is considered that the said order be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Wm. J. Armstrong, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office

Albany, November 22, 1933.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Wm. J. Armstrong, Clerk. (Seal.)

[fol. 39] In Supreme Court of New York, Albany County

Present: Honorable Ellis J. Staley, Justice.

The People of the State of New York, Upon the Relation of Elizabeth G. Pierson, Relator,

against

Thomas M. Lynch, John J. Merrill and John P. Hennessey, as Commissioners Constituting the State Tax Commissioners of the State of New York, Defendants

Judgment on Remittiter—Dec. 9, 1933

The Relator, Elizabeth G. Pierson, having applied to the Appellate Division of the Supreme Court, Third Judicial

Department, for the review by certiorari of a determination of the State Tax Commission, assessing an additional income tax against the Relator for the year 1928 in the sum of $76.16, being two percent of $2,223.72 rental income received from real property situated in Ohio and $1,584.31 profit on sale of real property situated in Ohio, and an order having been entered in the office of the Clerk of the Appellate Division of the Supreme Court, Third Judicial Department, on the 17th day of January, 1933, wherein and whereby it was ordered, adjudged and decreed that the determination of the State Tax Commission be annulled and that the proceeding be remitted to the said State Tax [fol. 40] Commission with the direction to fix the additional income tax assessed against the Relator herein by deducting from Relator's taxable income as determined by said State Tax Commission the sum of $2,223.72, that being the amount received by Relator as rentals from real property situated in Ohio and cancelling the tax of $44.47 assessed by them against such rentals and that the additional income tax assessed against the Relators for the calendar year 1928 be fixed at the sum of $31.69, and that Relator recover $50.00 costs and her disbursements in this proceeding, and the respondent having appealed to the Court of Appeals of the State of New York from the said order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, and said appeal having been duly argued in the Court of Appeals by Mr. Joseph M. Mesnig, of counsel for the appellants, and by Mr. Charles W. Pierson, of counsel for the respondent, a brief having been filed by amicus curiae, and due deliberation having been had thereon, and the said Court of Appeals having sent hither its remittitur now filed herewith by which it appears that the said Court of Appeals has affirmed with costs the order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, and further proceedings in said Court having been remitted to the Supreme Court there to be proceeded upon according to law, and the respondent's costs and disbursements in the Appellate Division of the Supreme Court, Third Judicial Department, and in the Court of Appeals having been duly taxed in the sum of Two Hundred Fifty-four and 56/100 dollars.

[fol. 41] Now, on reading and filing the remittitur from the Court of Appeals herein and upon motion of Alexander & Green, attorneys for the respondent, it is

Ordered that the said order and judgment of the Court of Appeals be, and the same hereby are, made the order of this Court, and it is further

Ordered, adjudged and decreed that the determination of the State Tax Commission be, and the same hereby is, annulled, and that the proceeding be, and the same hereby is, remitted to said State Tax Commission with the direction to fix the additional income tax assessed against the Relator herein by deducting from Relator's taxable income as determined by said State Tax Commission the sum of $2,223.72, that being the amount received by Relator as rentals from real property situated in Ohio and cancelling the tax of $44.47 assessed by them against such rentals, and that the additional income tax assessed against the Relator for the calendar year 1928 be, and the same hereby is, fixed at the sum of $31.69, and that Relator recover Two Hundred Fifty four 56/100 dollars her costs and disbursements in this proceeding.

Enter:

Ellis J. Staley, J. S. C.

(4615-C)

[fol. 42] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 2, 1934

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

MAR 2 193

CHARLES ELMORE CR

CLE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. [redacted]1

THOMAS M. LYNCH, JOHN J. MERRILL AND JOHN P. HENNESSEY, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, PETITIONERS,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, UPON THE RELATION OF ELIZABETH PIERSON.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

JOHN J. BENNETT, JR.,
Attorney General of the State of New York,

HENRY EPSTEIN,
Solicitor General of the State of New York,
Counsel for Petitioners.

JOSEPH M. MESNIG,
Assistant Attorney General of the State of New York,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 831

THOMAS M. LYNCH, JOHN J. MERRILL AND JOHN P. HENNESSEY, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, PETITIONERS,

against

THE PEOPLE OF THE STATE OF NEW YORK, UPON THE RELATION OF ELIZABETH PIERSON.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners constituting the State Tax Commission of the State of New York, respectfully shows to this Honorable Court:

A.

Matter Involved.

The petition prays that a writ of certiorari issue to review an order and judgment of the Supreme Court of the State of New York entered December 9, 1933, upon an or-

der and judgment of the Court of Appeals of the State of New York, such Court being the Court of last resort in that State, unanimously affirming a final order of the Appellate Division of the Supreme Court, Third Department (R. 20-21).

B.

Question Presented.

Whether, under the Constitution of the United States, the State of New York can impose an income tax upon a resident of the State of New York, with respect to income derived from the rentals of real property situated in another state, owned by such New York resident.

C.

Statement of the Case.

The facts herein were not in dispute. The taxpayer at all times a resident of New York, owned certain real property situated in the State of Ohio. In the year 1928, the taxpayer received rentals therefrom in the amount of $2,233.72 (R. 14). She filed a resident income tax return for the calendar year 1928 but did not include such rentals as taxable income. The State Tax Commission ruled that they were taxable and served a notice of additional assessment of income tax. The taxpayer, after a hearing and final determination by the Commission, instituted a certiorari proceeding under the New York Tax Law, to review the action of the Commission, contending that the imposition of the tax was violative of the Fourteenth Amendment of the United States Constitution. The Appellate Division of the Supreme Court, Third Department, by a divided Court, held that the State was without

power to lay the tax (R. 18-21). On appeal, the final order of the Appellate Division was unanimously affirmed by the Court of Appeals.

D.

Reasons Relied on for the Allowance of the Writ.

1. There was here drawn into question the validity of § 351 of the New York Tax Law upon the ground that, as herein applied, such statute was repugnant to the Fourteenth Amendment of the United States Constitution.

2. The question here presented has not, it is believed, been decided by this Honorable Court.

3. The contention of the taxpayer herein is rested upon the decision of this Honorable Court in the case of *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, on rehearing 158 U. S. 601; we think the Courts below misapplied and misconstrued the scope and effect of that decision, and erred in applying the principles there decided to the instant case.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of New York, commanding that Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Supreme Court in this case which was entitled in that Court: "The People of the State of New York upon the relation of Elizabeth Pierson, Relator, against Thomas M. Lynch, John J. Merrill and John P. Hennessey, as Commissioners constituting the State Tax Commission of the State of New York, Respondents", to the end that said case may be reviewed and determined

by this Court, as provided by law, the order and judgment reversed, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

MARK GRAVES,
JOHN J. MERRILL,
JOHN P. HENNESSEY,
As Commissioners Constituting the State Tax Commission of the State of New York,
By JOHN J. BENNETT, JR.,
Attorney-General of the State of New York,
HENRY EPSTEIN,
Solicitor General of the State of New York,
Counsel for Petitioners.
JOSEPH M. MESNIG,
Assistant Attorney-General of the State of New York,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 831

THOMAS M. LYNCH, JOHN J. MERRILL AND JOHN P. HENNESSEY, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, PETITIONERS,

against

THE PEOPLE OF THE STATE OF NEW YORK, UPON THE RELATION OF ELIZABETH PIERSON.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion of the Appellate Division of the Supreme Court, Third Department (R. 18), is reported in 237 App. Div. 763.

The Court of Appeals wrote no opinion; the memorandum decision is reported in 263 N. Y. (mem.) 19.

II.

Jurisdiction.

The order and judgment of the Supreme Court herein sought to be reviewed was entered upon the order and judgment of the Court of Appeals of the State of New York, which is the highest Court in the State in which a decision in the suit could be had.

The order and judgment of the Court of Appeals was rendered in a cause wherein was drawn into question the validity of § 351 of the New York Tax Law upon the ground that, as applied in the instant case, the statute was violative of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Jurisdiction is conferred on this Court by Section 237 of the Judicial Code, as amended by Act of Feb. 13, 1925, c. 229, § 1, 43 Stat. 937 (§ 344, Title 28, U. S. C. A.) and Act of February 13, 1925, c. 229, § 8, 43 Stat. 940 (§ 350, Title 28, U. S. C. A.).

III.

Statement of the Case.

There is no dispute as to the facts. The facts are fully set forth in the petition herein. (See page 2.)

IV.

Specification of Errors.

1. The Court of Appeals erred in holding that, for the purposes of a State income tax, such an income tax laid upon rentals from real property is in substance and effect a tax upon the real property itself.

2. The Court of Appeals erred in holding that the imposition of the New York income tax upon a resident, with respect to income derived from rentals of real property situated in another State, was a taking of property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution.

3. The Court of Appeals erred in applying the principles laid down in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, *same case* 158 U. S. 601, to the instant case. That case involved a decision as to whether a power to

tax existed; here the power to tax is unquestioned; the exercise of a conceded authority is challenged.

4. The Court of Appeals erred in holding that the tax in question was invalid as constituting double taxation.

5. The Court of Appeals erred in holding that § 351 New York Tax Law, as here applied, was violative of the Fourteenth Amendment.

V.

Summary of Argument.

1. The State of New York may legally and constitutionally impose an income tax upon its residents, upon and with respect to their entire statutory net income, from whatever source derived, except instrumentalities of the Federal Government.

2. The State of New York may lay an income tax upon a resident of that State with respect to income derived from rentals of real property situated in another State and such tax does not infringe upon or violate any constitutional right or privilege of the taxpayer.

3. The tax is equitable and justifiable.

VI.

ARGUMENT.

Point I.

The State of New York may legally impose an income tax upon its residents upon and with respect to their entire statutory net income, from whatever source derived.

Section 351 of the Tax Law is entitled "Imposition of income tax" and provides in part:

> "A tax is hereby imposed upon every resident of the State, which tax shall be levied, collected and paid

annually upon and with respect to his entire net income as herein defined, at rates as follows: * * *."

The term "net income" means the gross income of a taxpayer less the deductions provided for in Article 16 of the Tax Law (Tax Law, § 357).

Section 359 of the Tax Law provides that the term "gross income" includes gains, profits and income derived from dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also gains or profit and income derived from any source whatever. It is also provided that the amount of all such items of income shall be included in the gross income for the taxable year in which received by the taxpayer. The New York Income Tax is a general, nondiscriminatory tax on an individual and is not imposed on any particular income. It is imposed "upon every resident of the State" with respect to his entire net income from all sources. (*People ex rel. Central Union Trust Co.* v. *Wendell,* 197 App. Div. 131; affirmed 231 N. Y. 629, no opinion. See also *Clyde* v. *Gilchrist,* 262 U. S. 94.)

The *Central Union Trust* case dealt with the imposition of our income tax upon income derived from mortgage interest. Section 251 of the Tax Law provided that all mortgages of real property on which a recording tax had been paid and the debts and obligations secured thereby, should be exempt from taxation by the State and its instrumentalities. The Court considered the holding in the *Pollock* case, *infra,* and determined that the conclusion in that case did not apply and went further, saying (page 135):

> "There is still another view to take of this question. *The income tax is not directly at least imposed on any particular income.* The recording tax is imposed on the mortgage (§ 253); the income tax is imposed on the individual. It is 'imposed upon every resident of the

> State' (§ 351). His income is used only in fixing the measure of such tax. It is the net income on which the tax is computed (§ 351). The 'net income' means the 'gross income' of the taxpayer less legal deductions (§ 357) and in determining the 'gross income' mortgage interest as well as all other income is included with numerous exceptions specified in section 359. From such 'gross income' thus determined are to be subtracted numerous deductions (§ 360) and also certain exemptions (§ 362) before the tax is computed. *Hence the income from any particular source is but one element to be considered in connection with other elements in determining the measure of the taxation which is imposed on the individual.* In no proper sense may it be said that the tax is imposed on the interest of any particular mortgage. That is merely a factor in the determination of the amount of such taxation." (Italics ours.)

A State income tax generally has been held not a tax on property, or at least is not such a tax as to be included in the constitutional limitations imposed on property taxes.

Cooley on Taxation, Fourth Ed., § 1743.

The tax is justified because of the privileges residents of this State enjoy under the Constitution and laws of the State, and the benefits and protection they receive from the State. Such taxes are a recognized method of distributing the burdens of government, favored because requiring contributions from those who realize current pecuniary benefits under the protection of the government, and because the tax may be readily apportioned to their ability to pay.

Shaffer v. *Carter,* 252 U. S. 37,

In that case this Court said (page 52):

> "And we deem it clear, upon principle as well as authority, that * * * a State may impose general in-

come taxes upon its citizens and residents whose persons are subject to its control. * * *."

And again this Court said (page 57):

"As to residents it (the State) may, and does, exert its taxing power over their income from all sources, *whether within or without the State,* and it accords to them a corresponding privilege of deducting their losses, wherever these accrue." (Italics ours.)

The case of *Maguire* v. *Trefry,* 253 U. S. 12, upheld the imposition of a State income tax upon a resident with respect to income from a trust estate consisting of securities held by a trustee in another state. This Honorable Court quoted, with approval, the following excerpt from the decision in the State Court (p. 14):

"The income tax is measured by reference to the riches of the person taxed actually made available to him for valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden. It is founded upon the protection afforded to the recipient of the income by the government of the Commonwealth of his residence in his person, in his right to receive the income and in his enjoyment of the income when in his possession. That government provides for him all the advantages of living in safety and in freedom and of being protected by law. It gives security to life, liberty and the other privileges of dwelling in a civilized community. It exacts in return a contribution to the support of that government measured by and based upon the income, in the fruition of which it defends him from unjust interference. It is true of the present tax, as was said by Chief Justice Shaw in *Bates* v. *Boston,* 5 Cush. 93, at page 99, 'The assessment does not touch the fund, or control it; nor does it interfere with the trustee in the exercise of his proper duties; nor call

> him, nor hold him, to any accountability. It affects only the income, after it has been paid by the trustee' to the beneficiary."

Opposing counsel argued below that this case was not in point because the tax was upheld under the rule of *mobilia sequuntur personam.* We submit that this Court made a clear distinction between taxation of the corpus of the trust and the income derived therefrom. This is clearly indicated in the later case of *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83, where Virginia sought to tax the corpus of a trust, held in Maryland by a trustee for the benefit of a *cestui* domiciled in Virginia. This Court held that Virginia was without jurisdiction to lay such a tax because the *situs* of the corpus was beyond her jurisdiction. This Court said, however (p. 92):

> "The power of Virginia to lay a tax upon the fair value of any interest in the securities actually owned by one of her resident citizens is not now presented for consideration. See *Maguire* v. *Trefry, supra.*"

Is not this the equivalent of saying that a state may lay an income tax upon a resident's income derived from a trust held in another state, despite the fact that the corpus is beyond the taxing power of that state? We submit it is so.

In a recent decision of this Honorable Court, *Lawrence* v. *State Tax Commission,* 286 U. S. 276, Mr. Justice Stone said at page 279:

> "The obligation of one domiciled within a state to pay taxes there, arises from unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equitably among those who enjoy its benefits.

> *Hence domicile in itself establishes a basis for taxation.* Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government." (Italics ours.)

And again at page 280:

> "It is enough, so far as the constitutional power to levy it is concerned, that the tax is imposed by Mississippi on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, regardless of the place where it is carried on. The tax, which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received. These are rights and privileges incident to his domicile in the state and to them the economic interest realized by the receipt of income or represented by the power to control it, bears a direct legal relationship. It would be anomalous to say that although Mississippi may tax the obligation to pay appellant for his services rendered in Tennessee, still, it could not tax the receipt of income upon payment of that same obligation. *We can find no basis for holding that taxation of the income at the domicile of the recipient is either within the purview of the rule now established that tangibles located outside the state of the owner are not subject to taxation within it,* or is in any respect so arbitrary or unreasonable as to place it outside the constitutional power of taxation reserved to the state." (Italics ours.)

It is true that the income held taxable in the *Lawrence* case was derived from a business conducted in the foreign jurisdiction; we submit, however, that the fundamental principle is applicable to income derived from a tangible

located in another state. In the Court below, opposing counsel sought to distinguish this case upon the theory that the tax there was sustained because the source of the income was itself taxable. We submit that it is manifest that the decision was based upon very much broader grounds and that this Court's reference to the fact that the obligation from which the income in that case arose was taxable there, was only incidental.

There are numerous decisions upholding an income tax laid upon income derived from property, which itself could not be subjected to a tax.

The Federal Constitution (Const. Art. I, § 9, cl. 5) provides, "No tax or duty shall be laid on articles exported from any State." The net income of a corporation derived from exporting goods from the States and selling them abroad was held subject to the Federal Income Tax as part of its "entire income arising or accruing from all sources."

Peck v. *Lowe*, 247 U. S. 165.

At page 174 this Court said:

> "The tax in question is unlike any of those heretofore condemned. It is not laid on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. *On the contrary, it is an income tax laid generally on net incomes.* And while it cannot be applied to any income which Congress had no power to tax * * * *it is both nominally and actually a general tax.* It is not laid on income from exportation because of its source, or in a discriminatory way, but just as it is laid on other income. The words of the act are 'net income arising or accruing from all sources.' There is no discrimination. At most, exportation is affected only indirectly and remotely. *The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to*

use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins." (Italics ours.)

The New York Courts have held that the New York Personal Income Tax is not invalid as being a tax imposed upon interstate commerce (U. S. Const. Art. I, § 8, subd. 3), and upon exports (U. S. Const. Art. I, § 9, subd. 5) because the tax is not imposed upon the goods in interstate commerce or in process of exportation, but simply upon the net income of the business.

People ex rel. Stafford v. *Travis,* 231 N. Y. 339.

And it has been held that, although a state may not directly burden interstate commerce by taxation, yet it may, in laying a general income tax upon the gains and profits of a domestic corporation, include in the computation net income derived from transactions in interstate commerce without contravening the commerce clause in the Constitution.

U. S. Glue Co. v. *Oak Creek,* 247 U. S. 321.

POINT II.

The tax here imposed involves no infringement of the taxpayer's constitutional rights.

The entire structure of the taxpayer's contention rests upon the decision of this Court in the case of *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429; same case on rehearing, 158 U. S. 601, and it is insisted that this case is directly in point upon the proposition that an income tax upon rentals from real property is identical with a tax on the real property itself; and that, since the State of New York cannot tax real property situated in another state, it

may not impose an income tax upon its own residents with respect to income derived from the rentals of real estate located in another jurisdiction.

The *Pollock* case was a decision arising under the Federal Income Tax Law of 1894. The decision held that income from municipal bonds could not be taxed by the Federal government because it was a tax upon the power of the State and its instrumentalities to borrow money and, consequently, repugnant to the United States Constitution; it further held that a tax upon rents or income from real estate was a direct tax within the meaning of that term as used in the United States Constitution, and hence could not be levied without apportionment among the several states. We submit that the decision did not hold that a tax on income or gains from real estate was *identical* with a tax on the real estate itself. What the Court sought to determine solely was whether an income tax on the income from real property was a direct tax barred by the United States Constitution unless apportioned.

The *Pollock* case merely determined so far as at all relevant here that a Federal income tax laid upon income derived from real property was in the same category as a tax upon the real estate itself considering the matter *solely* from the standpoint of one of two great classifications: namely, direct taxes subject to the rule of apportionment, and duties, excises and imposts subject to the rule of uniformity.

The following quotation, taken from the dissenting opinion in the *Pollock* case, seems pertinent (p. 645):

> "It is said that a tax on the rentals is a tax on the land, as if the act here under consideration imposed an immediate tax on the rentals. This statement, I submit, is a misconception of the issue. The point involved is whether a tax on net income, when such in-

come is made up by aggregating all sources of revenue and deducting repairs, insurance, losses in business, exemptions, etc., becomes to the extent to which real estate revenues may have entered into the gross income, a direct tax on the land itself. In other words, does that which reaches an income, and thereby reaches rentals indirectly, and reaches the land by a double indirection, amount to direct levy on the land itself? It seems to me that the question when thus accurately stated furnishes its own negative response. Indeed, I do not see how the issue can be stated precisely and logically without making it apparent on its face that the inclusion of rental from real property in income is nothing more than an indirect tax upon the land."

The State of Wisconsin has developed an authoritative body of law bearing upon income tax laws and upon the question of the applicability of the *Pollock* case, we quote from *State ex rel. Bolens* v. *Frear,* 148 Wisconsin, 456, 134 N. W. 673; 135 N. W. 164; certiorari denied 231 U. S. 616:

"Another contention is that the act provides for double taxation, and for both reasons it is claimed that it denies to citizens the 'equal protection of the laws.' It is said in support of this contention that the United States Supreme Court in the Pollock case, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759 has held that taxation of income derived from land is in fact taxation of the land itself, hence that the act provides for double taxation, first of the land in specie, and next of the income therefrom. It seems that this claim may be very easily met. The question in the Pollock case was whether the taxation of rentals of land was direct taxation within the meaning of that term as used in the Constitution of the United States, and it was held to be the same, in substance, as a tax on the land itself, and hence a direct tax. This may be admitted for the purposes of the case, but it does not appear to in any way decide the question here at issue, or even to be very persuasive. The question there was of the power

> of Congress under that clause of the federal Constitution which forbids any direct federal tax, except one levied in proportion to the population. The question here is primarily of the power of the legislature of Wisconsin under its Constitution to levy an income tax in addition to a real estate tax, and, secondarily, whether such a tax denies to any one the equal protection of the laws."

So the question in the instant case concerns only the legal right of the State of New York to subject to its income tax, the net income of one of its residents, in part derived from rentals on real property located elsewhere, when such net income is commingled with and forms part of the taxpayer's entire net income. With the question whether it is a direct or indirect tax we are, of course, not remotely concerned.

And in *State ex Rel. Manitowoc Gas Co.* v. *Wisconsin Tax Commission* (1915), 161 Wis. 111; 152 N. W. 848, the Court said:

> "Even a tax on the income of real estate or of personal property, though declared in *Pollock* v. *Farmers L. & T. Co.*, 158 U. S. 601, to be a direct tax within the meaning of the Federal Constitution, requiring such taxes to be apportioned according to population, is not, when included in an income tax, a direct tax upon property as such. Our income tax is a burden laid upon the recipient of the income whether derived from real estate, personal property or labor, the amount of which is determined by the amount of the total net income derived from these sources, singly or combined. It is a toll taken from the fruits of property and labor in proportion to the net value of the harvest."

The effect of the *Pollock* case has been very much weakened by subsequent decisions of the United States Supreme

Court. Thus, in *Brushaber* v. *Union Pacific R. R.*, 240 U. S. 1, which was a decision involving the Federal Income Tax Act of 1913, this Court said, in speaking of the decision in the *Pollock* case (p. 16):

> "The court, fully recognizing in the passage which we have previously quoted the all-embracing character of the two great classifications including, on the one hand, direct taxes subject to apportionment, and on the other, excises, duties and imposts subject to uniformity, held the law to be unconstitutional in substance for these reasons: Concluding that the classification of direct was adopted for the purpose of rendering it impossible to burden by taxation accumulations of property, real or personal, except subject to the regulation of apportionment, it was held that the duty existed to fix what was a direct tax in the constitutional sense so as to accomplish this purpose contemplated by the Constitution. (157 U. S. 581.) Coming to consider the validity of the tax from this point of view, *while not questioning at all that in common understanding it was direct merely on income and only indirect on property,* it was held that considering the substance of things it was direct on property in a constitutional sense since to burden an income by a tax was from the point of substance to burden the property from which the income was derived and thus accomplish the very thing which the provision as to apportionment of direct taxes was adopted to prevent. As this conclusion but enforced a regulation as to the mode of exercising power under particular circumstances, it did not in any way dispute the all-embracing taxing authority possessed by Congress, including necessarily therein the power to impose income taxes if only they conformed to the constitutional regulations which were applicable to them. Moreover in addition the conclusion reached in the *Pollock Case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property,* but on the contrary recog-

> nized the fact that *taxation on income was in its nature an excise* entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it." (Italics ours.)

In a more recent case, *Bromley* v. *McCaughn*, 280 U. S. 124, involving the constitutionality of the Federal Gift Tax, the tax was challenged upon the ground that it was a direct tax upon property and, hence, void, because unapportioned.

This Court held that while taxes levied upon or collected from persons because of their general ownership of property, may be considered as direct, on authority of the *Pollock* case, yet a tax imposed on a particular use of property or on the exercise of a particular incidental to ownership, was an excise which did not need to be apportioned.

After enumerating a series of taxes of a kindred nature which had been upheld, this Court said (p. 137):

> "It is true that in each of these cases the tax was imposed upon the exercise of one of the numerous rights of property, but each is clearly distinguishable from a tax which falls upon the owner *merely because he is owner*, regardless of the use or disposition made of his property."

This Court rejected the argument that a tax upon the keeping or giving of property was no different from a tax on the property itself.

Here the tax is not imposed merely because the taxpayer happens to be the owner of Ohio real estate, but solely because the net income from that property forms a part of her entire net income and, inasmuch as she enjoys the bene-

fits and protection of our laws and our sovereignty, she is called upon to bear a portion of the cost of government, in proportion to her ability to pay.

This is precisely the theory of this Honorable Court in upholding the tax under consideration, in *Peck* v. *Lowe, supra,* 247 U. S. 165, when this Court said (p. 174), that the tax was not laid upon income "because of its source, or in a discriminatory way, but just as it is laid on other income", and that the tax was both nominally and actually a general tax laid upon net income arising or accruing from all sources without discrimination, the source of the income being affected but indirectly and remotely, for the reason that the tax was levied "after the recipient of the income is free to use it as he chooses".

In no wise is the imposition of this tax violative of the Fourteenth Amendment to the Federal Constitution, as urged by the taxpayer in the Court below.

Point III.

The imposition of this tax is equitable and justifiable.

The tax here imposed is laid upon the taxpayer's net income from all sources, generally and without discrimination; hence she is allowed to deduct the necessary expenditures connected with the production of that income. Only that portion of her income derived from the rentals of the Ohio Property which she is able to take to herself here in New York State, and use and enjoy as she chooses, is taxed.

No claim is made that taxpayer has been unable to receive and enjoy the net income here taxed, in this state, where she resides and enjoys the benefits of the sovereignty of New York State. If the taxpayer's contention be correct and if her income were derived, as conceivably it might, entirely from real property located in other states,

she would be entitled to enjoy the benefits and protection of our sovereignty and, while able to make a contribution to the cost of government, would be relieved from so doing.

We perceive a wide distinction between inheritance taxation and income taxation, so far as the effect of so-called multiple taxation is concerned. We refer to this in view of the fact that opposing counsel urged the applicability of the Inheritance Tax cases (*Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83; *Farmers Loan Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *So. Carolina*, 282 U. S. 1; *First National Bank of Boston* v. *Maine*, 284 U. S. 312) in the Court below.

In inheritance taxation, the incidence of the tax arises from the single event of death. Yet, by the exercise of a truly arbitrary power, successions or transfers were formerly subjected to a multiplicity of taxes by various taxing jurisdictions, frequently without a semblance of a compensatory benefit to the taxpayer.

Not so with an income tax. There the incidence of the tax is coupled with a direct and compensatory benefit to the individual called upon to bear the tax, either in his person or in his property. If the taxpayer voluntarily chooses to reside in one state and conduct a business or own property in another, he should not complain if each state exacts an income tax, proportioned to the taxpayer's economic ability to respond to the costs of government in those states, the benefits of whose laws he invokes and accepts, either in his person or in his property.

In the instant case, the taxpayer chooses to reside in New York and enjoy here the fruits of property which she owns in Ohio. She has no justifiable complaint because New York and Ohio each ask her to contribute to the costs of government, since New York protects her in her person, and Ohio lends its protection to her property.

The tax is an integral part of an entire taxing scheme, considered necessary for satisfying the needs of the State for revenue. A measure may be valid as a necessary adjunct to something which clearly lies within the legislative power, even though, standing alone, its constitutionality might be subject to doubt.

Purity Extract Co. v. *Lynch*, 226 U. S. 192;
Ruppert v. *Caffey*, 251 U. S. 264;
Everards Breweries v. *Day*, 265 U. S. 545;
Taft v. *Bowers*, 278 U. S. 470, 482.

Conclusion.

Petitioner, therefore, submits that this is a proper case for the issuance of a writ of certiorari.

Respectfully submitted,

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Of Counsel.

APPENDIX A.

"§ 351. Imposition of income tax. A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: One per centum of the amount of net income not exceeding ten thousand dollars; two per centum of the amount of net income in excess of ten thousand dollars, but not in excess of fifty thousand dollars; three per centum of the amount of net income in excess of fifty thousand dollars. A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state. Such tax shall first be levied, collected and paid in the year nineteen hundred and twenty upon and with respect to the taxable income for the calendar year nineteen hundred and nineteen, and for any taxable year ending during the year nineteen hundred and nineteen."

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APR 20 1

CHARLES ELMORE

Supreme Court of the United States

October Term, 1933.

No. [redacted]1.

THOMAS M. LYNCH, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners Constituting The State Tax Commission of The State of New York,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of ELIZABETH PIERSON.

BRIEF FOR PETITIONERS, SUPPLEMENTAL TO BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

October Term, 1933.

No. 831.

THOMAS M. LYNCH, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners Constituting The State Tax Commission of The State of New York,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of ELIZABETH PIERSON.

BRIEF FOR PETITIONERS, SUPPLEMENTAL TO BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement.

This cause comes to this Honorable Court upon the entry of an order on the 2nd day of April, 1934, by this Court, granting a petition for a writ of certiorari directed to the Supreme Court of the State of New York. Petitioners respectfully file this brief as a supplement to the brief in support of the petition for writ of certiorari.

ARGUMENT.

A State income tax laid upon the rents of real property located in another State is not a tax upon the property, and such a tax is not violative of the Constitution of the United States.

The decisions of the State courts here under review and the contention of the taxpayer herein rest entirely upon the principle that real property and tangible personal property may only be taxed by the State of domicile, and upon the mistaken belief, as we contend, that this Honorable Court, in the case of *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, on rehearing 158 U. S. 601, held that a tax upon the income of real property was a tax on the real property itself. We think that the State courts have misconceived the scope and effect of the decision in the *Pollock* case.

So far as applicable to an income tax on the rents of real property, the decision in the *Pollock* case was limited to a holding that a tax on the rents or income of real estate is a direct tax within the meaning of the United States Constitution. On the rehearing of the case, Mr. Chief Justice Fuller said, at page 618:

> "Our previous decision was confined to the consideration of the validity of the tax on the income from real estate and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution; *and the Court went no farther, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct;* while as to the income from municipal bonds, that could not be taxed because of want of power to tax the source, and

no reference was made to the nature of the tax as being direct or indirect." (Emphasis ours.)

In *Knowlton v. Moore*, 178 U. S. 41, at page 82, this Honorable Court said, of the decision in the *Pollock* case:

> "The constitutional meaning of the word direct was the matter decided. Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was *the legal equivalent of a direct tax on the property from which said income was derived*, and hence must be apportioned." (Emphasis ours.)

In *Flint v. Stone Tracy*, 220 U. S. 108, this Court said, page 162:

> "In the *Pollock* case, as we have seen, the tax was held unconstitutional, because it was *in effect* a direct tax on the property solely because of its ownership." (Emphasis ours.)

In *McCoach v. Minehill Railway Co.*, 228 U. S. 295, at page 301, this Court, analyzing its decision in the *Flint v. Stone Tracy* case, said:

> "In discussing the constitutional question, reference was first made to the case of *Pollock v. Farmers Loan & Trust Co.* * * * which held the income tax provisions of the Act of August 27, 1894 * * * to be unconstitutional because *amounting to* a di-

> rect tax within the meaning of the Constitution, and because not apportioned according to population as required by that instrument." (Emphasis ours.)

In *Stratton's Independence v. Howbert*, 231 U. S. 399, at page 414:

> "This court had decided in the *Pollock Case* that the income tax law of 1894 *amounted in effect to a direct tax* upon property, and was invalid because not apportioned according to population as prescribed by the Constitution." (Emphasis ours.)

It is clear, we think, that the *Pollock Case* is a determination that an unapportioned Federal income tax upon the income of real property is violative of the Constitution, but in no wise holds that a tax on such income *is* a tax on the property.

The Appellate Division, in its opinion in the instant case, quoted from the *Pollock Case* as follows:

> "An income tax upon the annual value or annual user of real estate appears to be the same in substance as an annual tax upon the real estate which would be paid out of the rent or income. *(Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 581.)"

This is illustrative of the danger of culling a general statement from an opinion and quoting it apart from the context of the opinion. Immediately preceding the sentence quoted by the Court below are the following two sentences:

> "The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its

> ownership belongs to the other? We are unable to perceive any ground for the alleged distinction."

Very plainly the Court was considering the nature of a tax upon the income of real estate and of a tax upon the real estate itself solely from the standpoint of direct or indirect taxation. The power of Congress to impose an income tax on the rents of real estate as a general proposition, was not at all in question—there was only the question of the constitutionality of an unapportioned Federal tax on income from real estate.

The imposition of a Federal income tax upon a citizen of the United States, upon income derived from real estate situated in Mexico, has been upheld *(Cook v. Tait,* 265 U. S. 47).

If the *ratio decidendi* of the *Pollock* case was, as held by the State courts, that a tax on the income from real estate was a tax on the real estate itself, then Congress manifestly could not have subjected the income from Mexican real estate to an income tax.

If the imposition of a Federal income tax upon income derived from Mexican real estate was not a taking of property without due process of law, in derogation of the Fifth Amendment, then we believe that it necessarily follows that the imposition of a State income tax upon one of its residents, with respect to income from property located in another State, is not a taking of property without due process of law, in violation of the Fourteenth Amendment.

In *Cook v. Tait, supra,* the Court said, page 56:

> "In other words, the principle was declared that the government, by its very nature, benefits the citizen and his property wherever found and, therefore, has the power to make the benefit complete. Or to express it another way, the basis of the power to tax was not and cannot be made dependent upon the *situs* of the property in all cases, it being in or out of the United States, and was not and cannot be made dependent upon the domicile of a citizen, that being in or out of the United States, but upon his relation as citizen to the United States and the relation of the latter to him as citizen. The consequence of the relations is that the native citizen who is taxed may have domicile, and the property from which his income is derived may have *situs,* in a foreign country and the tax be legal—the government having power to impose the tax."

Without question, the State of New York has power to impose an income tax upon one of its residents. Domicile in itself establishes a basis for taxation *(Lawrence v. State Tax Commission,* 286 U. S. 276). Enjoyment of the privileges of residence and citizenship in a State amply justifies the requirement that its residents and citizens respond to the cost of its government.

All subjects over which the sovereign power of the State extends are objects of taxation *(McCulloch v. Maryland,* 4 Wheat. 428).

The power of a State as to the form and mode of taxation is unlimited unless restrained by the Constitution of the United States, where the subject is within the jurisdiction of the State (State Tax on Foreign Held Bonds, 15 Wall. 300).

A debt may be taxed by a State to a resident thereof, though held against a non-resident, evidenced by the bond of such non-resident and secured by a mortgage upon real estate situate in another State; and this, though the bond be held or deposited without the State (*Kirtland v. Hotchkiss,* 100 U. S. 491). In that case this Honorable Court said, at page 498:

> "The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow citizens of the same State, to contribute for the support of the government whose protection he enjoys."

In *Fidelity & C. Trust Co. v. Louisville,* 245 U. S. 54, a case involving the imposition of a personal property tax on a bank deposit located in another State, this Court said (page 58):

> "The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the State so chooses, may be measured more or less by reference to the riches of the person taxed."

Opposing counsel concedes that the State of New York has power, in the physical sense, to tax its residents on rentals from real estate located elsewhere, but contends that it lacks the legal power to lay such a tax because the United States Constitution imposes a restraint on the exercise of such physical powers. But the claimed constitutional restraint arises from the mistaken postulate that a tax on the income from

real estate is a tax on the real estate itself. That such a tax, to some extent, burdens the real estate may be conceded and that such a tax accomplishes a similar effect as an unapportioned tax on the real estate may also be admitted without in any wise affecting the question now before this Honorable Court. Conceding all these matters, we still think that it is most manifest that the constitutional restriction against the taxation by a State of real property or tangible personal property located beyond the borders of the taxing State, has no application to the taxation by a State of one of its residents, with respect to the income from real property located in another jurisdiction; and this, especially, where the taxation reaches such income, as part of a general integrated system of taxation, and the particular item of income has lost its identity and become intermingled with and part of the resident's entire net income from all sources.

There is no merit in respondent's contention that the record does not show that a Federal question was expressly or necessarily decided by the State Court.

Respondent opposed petitioners' application for a writ of certiorari in this Honorable Court, upon the ground that it did not affirmatively appear that the Appellate Division of the New York Supreme Court ever passed upon the federal questions upon which application for the writ was based, or that the decision of these federal questions was necessary to the decision of the case. Respondent then set forth an incomplete quotation from Brief of Respondent in the New York Court of Appeals and argued that an independ-

ent ground, *i. e.*, statutory construction, existed and was urged in the Court of Appeals.

Respondent, in quoting from her brief in the Court of Appeals, omitted the opening words of the first sentence, which were, "In conclusion under this point let it be noted that" we do not dispute, etc., etc.

And the point under which this phase of Respondent's argument was made was captioned:

> "Under the Federal Constitution a State of the Union may not exact a tax which constitutes, in substance and effect, a tax on tangible property situated in another state. Such an exaction would violate the due process clause of the Fourteenth Amendment."

Stating in her brief in the Court of Appeals, the question presented to that Court, respondent said:

> "This appeal presents a single question—whether under the Constitution of the United States a State can impose an income tax with respect to income derived from rentals from real property situated in another State."

In opposition to petitioners' application for writ of certiorari, respondent also contended that the opinion of the Appellate Division (R. 19) indicated that the decision was on a non-Federal ground. The contention is refuted by the opinion itself, which clearly was based on a Federal ground and by the further fact that the Appellate Division, by the same opinion and decision sustained, under the same statutory provision, the imposition of the New York income tax upon income from the same Ohio real estate, derived in the form of profit

from a sale thereof, upon the theory that such a tax was an excise and not a property tax, as it unquestionably found the tax on rental income to be.

CONCLUSION.

The order and judgment of the Supreme Court of the State of New York should be reversed and the determination of the State Tax Commission confirmed, with costs.

Respectfully submitted,

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HENRY EPSTEIN,
Solicitor General of the State of New York,
Counsel for Petitioners,

JOSEPH M. MESNIG,
Assistant Attorney General of the State of New York, of Counsel.

Appendix A.

NEW YORK TAX LAW, §351.

"§351. Imposition of income tax. A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: One per centum of the amount of net income not exceeding ten thousand dollars; two per centum of the amount of net income in excess of ten thousand dollars, but not in excess of fifty thousand dollars; three per centum of the amount of net income in excess of fifty thousand dollars. A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state. Such tax shall first be levied, collected and paid in the year nineteen hundred and twenty upon and with respect to the taxable income for the calendar year nineteen hundred and nineteen, and for any taxable year ending during the year nineteen hundred and nineteen."

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Supreme Court of the United States

OCTOBER TERM, 1933

No. [redacted] /

THOMAS M. LYNCH, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners Constituting the State Tax Commission of the State of New York,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of ELIZABETH PIERSON.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

CHARLES W. PIERSON,
Counsel for Respondent.

CORPORATE PRESS, INC., NEW YORK CITY

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Supreme Court of the United States

OCTOBER TERM, 1933

No. 831

THOMAS M. LYNCH, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners Constituting the State Tax Commission of the State of New York,
Petitioners,
against
THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of ELIZABETH PIERSON.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Official Report of Opinions Delivered.

The opinion of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, is reported in 237 App. Div. 763. The affirmance is reported without opinion in 263 N. Y. (Mem.) 19.

Statement of Case.

The respondent instituted a certiorari proceeding under the provisions of the Tax Law of the State of New York (Sections 375, 199) to review a determination of the State Tax Commission assessing an additional income tax against the relator for the Calendar Year 1928. The order of the Appellate Division, Third Judicial Department included the annulment of the determination of the State Tax Commis-

sion imposing an income tax on rentals from Ohio real estate (R. 18-21). The petitioners appealed to the Court of Appeals from so much of the order of the Appellate Division as annulled such determination.

In 1928 the relator, a native of Ohio, residing in New York, received rental income of $2,223.72 from some Cincinnati real estate inherited from her father (R. 15, 16). She did not include these rentals as taxable income in her New York Income Tax Return, claiming that they were not taxable by the State of New York (R. 10b, Exhibit 2). The State Tax Commission ruled that they were taxable and assessed a tax of 2% upon these specific rentals (R. 12a, Exhibit 4). The Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, annulled the assessment and held that the rental income in question might not be included by the State of New York as a part of the relator's income for the purposes of income tax. The final order was unanimously affirmed by the Court of Appeals without opinion (R. 23, 24).

Argument.

The petitioners seek a writ of certiorari to the Supreme Court of the State of New York upon the ground that the proceeding has drawn into question the validity of Section 351 of the New York Tax Law; that the question presented has not been decided by this Honorable Court and that the Courts below misapplied and misconstrued the scope and effect of this Honorable Court's decision in *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, on rehearing 158 U. S. 601.

I.

The record does not show that a federal question was expressly or necessarily decided by the state court.

It does not affirmatively appear that the Appellate Division of the New York Supreme Court, Third Judicial Department, ever passed upon the federal questions on which counsel for the petitioners base the application for the writ, or that the decision of these federal questions was necessary to the decision in this case.

Mellon v. *O'Neil,* 275 U. S. 212.

An independent ground (the proper construction of the New York taxing act) existed and was urged upon the attention of the New York Court of Appeals as will appear from the following quotation from respondent's brief in that Court:

> "* * * we do not dispute appellants' proposition (Point IV of Appellants' Brief) that a statute is entitled to a presumption of constitutionality. In this case it is not necessary to attack the constitutionality of the New York Tax Law but only the construction sought to be put upon that statute by the Tax Commissioners. While the language of Section 351 imposing an income tax on residents ('entire net income') is general in form, it should, under well recognized principles, be construed as relating only to matters within the jurisdiction of the law-making body. Section 351 is not the only provision of the New York Tax Law where this principle of construction must be applied. For example, Section 3 provides that 'all personal property situated or owned within this State' is taxable, and Section 8 provides that 'every person shall be taxed in the tax district where he resides * * * for all personal property owned by him or under his control.' The language of these two sections is general, but no one supposes that it covers tangible property having a definite situs outside the State. See, e. g., Hoyt v. Commissioners of Taxes, 23 N. Y. 224."

The opinion of the Appellate Division indicates that the majority of that Court took this view (R. 19). The Court of Appeals affirmed without opinion.

It is respectfully submitted that the petitioners' application for a writ of certiorari should be denied.

CHARLES W. PIERSON,
Counsel for Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1933

No. [redacted] 1

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Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of ELIZABETH PIERSON,

Respondent.

BRIEF FOR THE RESPONDENT

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CORPORATE PRESS, INC., NEW YORK CITY

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Supreme Court of the United States

OCTOBER TERM, 1933

No. 831

THOMAS M. LYNCH, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners Constituting The State Tax Commission of the State of New York,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of ELIZABETH PIERSON,

Respondent.

BRIEF FOR THE RESPONDENT

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The opinion of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, is reported in 237 App. Div. 763.

The affirmance, without opinion, is reported in 263 N. Y. 533.

Statement of Case.

The respondent instituted a certiorari proceeding under the provisions of the Tax Law of the State of New York (Sections 375, 199) to review a determination of the State Tax Commission assessing an additional income tax against the relator for the Calendar Year 1928. The order of the Appellate Division, Third Judicial Department, included the annulment of the determination of the State Tax Commission imposing an income tax on rentals from Ohio real estate (R. 18-21). The petitioners appealed to the Court of Ap-

peals from so much of the order of the Appellate Division as annulled such determination.

In 1928 the relator, a native of Ohio, residing in New York, received rental income of $2,223.72 from some Cincinnati real estate inherited from her father (R. 15, 16). She did not include these rentals as taxable income in her New York State Income Tax Return, claiming that they were not taxable by the State of New York (R. 10b, Exhibit 2). The State Tax Commission ruled that they were taxable and assessed a tax of 2% upon these specific rentals (R. 12a, Exhibit 4). The Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, annulled the assessment and held that the rental income in question might not be included by the State of New York as a part of the relator's income for the purposes of income tax (237 App. Div. 763). The final order was unanimously affirmed by the Court of Appeals without opinion (R. 23, 24; 263 N. Y. 533).

Summary of the Argument.

The record does not show that a Federal question was expressly or necessarily decided by the State Court.

A tax upon the rentals from real estate is in substance and effect a tax upon the real estate.

Under the Federal Constitution a State of the Union may not exact a tax which constitutes, in substance and effect, a tax on tangible property situated in another State. Such an exaction would violate the due process clause of the Fourteenth Amendment.

I.

The record does not show that a federal question was expressly or necessarily decided by the state court.

It does not affirmatively appear that the Appellate Division of the New York Supreme Court, Third Judicial Department, passed upon the federal question on which counsel for the petitioners based the application for the writ, or that the decision of any federal question was necessary to the decision in this case.

Mellon v. *O'Neil,* 275 U. S. 212.

The petitioners state (Brief in Support of Petition, p. 6) that,

> "Jurisdiction is conferred on this Court by Section 237 of the Judicial Code, as amended by Act of Feb. 13, 1925, c. 229, § 1, 43 Stat. 937 (§ 344, Title 28, U. S. C. A.) and Act of February 13, 1925, c. 229, § 8, 43 Stat. 940, (§ 350, Title 28, U. S. C. A.)."

Section 237, so far as here relevant, reads as follows:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States; or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of * * * the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied * * *."

We maintain that:

(1) There was not drawn in question in this proceeding the validity of any statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or on any other ground. There is nowhere in the record any holding that the New York Tax Law is in any respect invalid;

(2) There was not in this proceeding either sustained or denied any title, right, privilege or immunity set up or claimed by either party under the Constitution, or any treaty or statute of the United States.

The petitioners include in their Specification of Errors (Brief in Support of Petition, pp. 6-7), the following:

"2. The Court of Appeals erred in holding that the imposition of the New York income tax upon a resident with respect to income derived from rentals of real property situated in another State, was a taking of property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution," and

"5. The Court of Appeals erred in holding that § 351 New York Tax Law, as here applied, was violative of the Fourteenth Amendment."

We submit that the Court of Appeals made neither of the determinations above recited. The only determination made by that Court, as reported in 263 N. Y. 533, 534, consists of six words, as follows:

"Order affirmed, with costs; no opinion."

Nor did the Appellate Division of the Supreme Court of New York make either of such determinations. What that Court actually held, as appears in the Opinion of Presiding Judge HILL (Transcript of Record, p. 19) was:

> "The rental income from this real property located in Ohio may not be included by the State of New York as a part of relator's income for the purposes of the income tax."

There is no suggestion in that language that the Appellate Division, in order to arrive at that conclusion, held that the statute under consideration was in any respect invalid. Here was a local statute of the State of New York, construed by the petitioners, constituting an administrative body of the State of New York, to be so broad in its terms that it included the rentals in question, and construed otherwise by the Appellate Division.

It has been held repeatedly by this Honorable Court, that the meaning attributed by the highest court of a State to a statute of the State must be accepted by this Court, on review, as though it had been specifically expressed in the statute. In *Supreme Lodge, Knights of Pythias* v. *Meyer,* 265 U. S. 30, this Court said, at pages 32-3:

> "Under the settled rule of this Court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the State fixing the meaning of the state legislation, as though such meaning had been specifically expressed therein (citing authorities). And we follow the state construction even though it may not agree with our own opinion."

We submit that while the petitioners were of the opinion that the meaning of the words "entire net income" was broad enough to include the rental income from the real property located in Ohio, the Appellate Division was of the opinion that such was not their meaning, and we assume that this Court will accordingly, in conformity with its settled rule, accept the meaning determined by the State Court.

It has also been held repeatedly by this Honorable Court in a long line of cases such as *Williams* v. *Oliver* (Md. 1851), 43 U. S. (12 How.) 111, and numerous others, that in order to give this Court jurisdiction on writ of error to the highest court of a state in which a decision could be had, it must appear affirmatively not only that a federal question was presented for decision by the highest court of the state having jurisdiction but that the decision of the federal question was necessary to the determination of the cause, that it was actually decided, or that the judgment as rendered could not have been given without deciding it, and where the decision complained of rests on independent grounds not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this Court without considering any federal question that may also have been presented.

In *Consolidated Turnpike Company* v. *Norfolk & Ocean View Railway Company,* 228 U. S. 596, it was held that where the judgment of the state court rests upon a question of general law broad enough to support the decision, this Court will not consider the federal question, although it may have been raised in and passed upon by the court below.

It is true that the Appellate Division's opinion refers to the Fourteenth Amendment, *arguendo,* but our contention is that to reach the conclusion that rentals from real estate located outside the State of New York were not to be taxed it was not necessary to have recourse to the Amendment.

We maintain that the decision of the Federal question presented herein was not necessary to the determination of the cause. The Federal question whether or not the *imposition* of the tax by the petitioners violated the taxpayer's rights under the Fourteenth Amendment was presented but a decision of that question was not necessary to the determination of the cause. The Appellate Division held that the thing taxed was without the jurisdiction of the State and therefore was

not to be included in determining the "entire net income" taxed by the statute. There was no suggestion that the Court held that it could not be included only because of the Fourteenth Amendment, or that but for the barrier of that amendment the Legislature would have intended to include it. We submit that there is nothing to indicate that the Appellate Division would have arrived at a different conclusion if there were no such barrier in existence as the Fourteenth Amendment, and that the ground upon which the decision was actually based was the ground above stated, an independent ground not involving a Federal question and broad enough to maintain the judgment.

If the statute under consideration by the New York courts in this case had attempted in express terms to impose a tax on rentals derived from real estate located in another state, then it would have been necessary for the State Courts to have declared it an unconstitutional attempt to impose a tax. The State statute does not, however, contain any language in terms imposing a tax on rentals derived from real property outside the State. It should not be presumed that the State intended to attempt to tax property located outside its jurisdiction any more than it would be presumed that the Legislature of the state, in imposing a tax upon the "entire net income" of a resident of the State, intended to impose a tax on any other non-taxable income such as, for instance, income from United States Government bonds. All that was decided by the State Courts in the instant case was, in effect, that the statute in question should not be so construed as to attribute to the Legislature an attempt to tax property beyond the jurisdiction of the State.

The respondent submits that in the absence of any of the requisites prescribed in Section 237, *supra,* that is, where no question has been presented as to the validity of the New York statute, where the issue as to the Fourteenth Amendment was neither sustained nor denied, and where the judgment sought to be reviewed herein was rendered in accord-

ance with general principles of law not involving any Federal question, this Honorable Court is without jurisdiction herein, and the case should be dismissed for the want of a Federal question.

II.

A tax upon the rentals from real estate is in substance and effect a tax upon the real estate.

Pending the decision of this Honorable Court as to its jurisdiction herein, the respondent respectfully submits the following argument on the merits.

There are various theories as to the nature of an income tax. At one time or another it has been said to be

> A tax on the person measured by the income received;
>
> A tax on the property from which the income is derived;
>
> A tax on the income itself as property;
>
> An excise on the privilege of receiving income (see discussion and cases cited in 42 Yale Law Journal, 283-284).

We deem it unnecessary to discuss these theories or attempt to choose between them, because our argument under this Point does not depend on any one of them. As said by this Court in reply to an argument that an income tax is in its nature a personal tax rather than a property tax:

> "This argument, upon analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the Federal Constitution. For, where the question is whether a state taxing law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed" (*Shaffer* v. *Carter*, 252 U. S. 37, at p. 55).

The decision of this Court in the so-called "Income Tax Cases" (*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 580; same case on rehearing, 158 U. S. 601, 629) is directly in point upon the proposition that a tax on rentals is in substance and effect a tax on the land. The question was whether the constitutional inhibition against a direct tax on land unless apportioned among the States applied also to a tax upon the income from land.

The Court said (157 U. S. at p. 581):

> "An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income."

And on rehearing (158 U. S. p. 630):

> "We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it cannot be sustained, * * * it follows that, if the revenue derived from municipal bonds cannot be taxed because the source cannot be, the same rule applies to revenue from any other source not subject to the tax; and the lack of power to levy any but an apportioned tax on real and personal property equally exists as to the revenue therefrom."

Petitioners' efforts to distinguish this case (see Point II of Brief for Petitioners in Support of Petition for Writ of Certiorari) do not seem to us successful. True, the question was whether the tax on rental income was a direct tax, but the reason assigned (and the only possible ground) for holding that it was a direct tax was that it was in substance and effect a tax on the land. Petitioners themselves seem so doubtful whether the *Pollock* case can be distinguished that in the State courts they fell back on the argument that the decision is thirty-eight years old, conditions have changed, and it is time for a new and different determination.

The *Pollock* case is by no means the only authority for our proposition. This Court has repeatedly held in other cases that a tax upon net income received from non-taxable property is in effect a tax upon the property itself. A number of such cases are cited in the *Pollock* case (157 U. S. at p. 581 *et seq.*). For later decisions, see, e. g.,

Gillespie v. *Oklahoma,* 257 U. S. 501.

(Oklahoma state income tax upon net income derived by lessee from sales of oil and gas received under leases of restricted Indian lands held void as in effect a tax upon the leases.)

Northwestern Life Ins. Co. v. *Wisconsin,* 275 U. S. 136;
Natl. Life Ins. Co. v. *United States,* 277 U. S. 508;
Macallen Co. v. *Massachusetts,* 279 U. S. 620.

(Holding in substance that a state tax on the income of United States bonds is void because in effect a tax on the bonds themselves.)

The Supreme Court of Massachusetts has said (*Opinion of the Justices,* 220 Mass. 613, 624):

> "A tax upon the income of property is in reality a tax upon the property itself. Income derived from property is also property. Property by income produces its kind, that is, it produces property and not something different. It does not matter what name is employed. The character of the tax cannot be denied by calling it an excise and not a property tax. In the essence a tax upon income derived from property is a tax upon the property."

The proposition that a tax on rentals from real estate is in substance and effect a tax on the real estate, is implicit in statutes taxing income from local real estate owned by non-residents (e. g., N. Y. Tax Law, § 351) and in the decisions

(e. g., *Schaffer* v. *Carter,* 252 U. S. 37) upholding such taxes, for the real estate is the only thing within reach of the taxing power.

III.

Under the Federal Constitution a State of the Union may not exact a tax which constitutes, in substance and effect, a tax on tangible property situated in another state. Such an exaction would violate the due process clause of the Fourteenth Amendment.

The Supreme Court of New Hampshire in an advisory opinion has expressly so held (Opinion of the Justices, 84 N. H. 559, at p. 573; same case, 149 Atlantic Reporter 321, at pp. 328-329). The Court said:

> "The provision for the taxation of rents cannot be applied to rent paid for the use of real property situated outside the state, although the rent is received by a resident. It has always been the accepted rule that a state cannot lay a tax upon realty not within its jurisdiction. * * *
>
> "In *Pollock* v. *Company,* 157 U. S. 429; s. c. 158 U. S. 601, it was held upon great consideration that a tax laid upon rent is a direct tax upon the land out of which the rent issues. * * * While the question, whether a state could tax rent received for the use of realty over which the state had no jurisdiction, was expressly excluded from consideration in *Union, &c., Co.* v. *Kentucky, supra,* the logic of the later decisions points plainly to the conclusion that such a tax would be in violation of the provisions of the federal constitution. *Natl. Life Ins. Co.* v. *United States,* 277 U. S. 508; *Gillespie* v. *Oklahoma,* 257 U. S. 501.
>
> "We are of opinion that a state cannot tax income received as compensation for the use of either real estate or tangible personal property which has a *situs* outside the state."

This case appears to have been accepted by the text books as settling the law upon the subject (see e. g., 61 Corpus Juris 1562).

This Court has not yet had occasion to pass upon the question squarely. As noted by the New Hampshire Supreme Court the question was expressly excluded from consideration in *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, 204. There can be little doubt, however, that the New Hampshire Court was right in saying that:

> "The logic of the later decisions points plainly to the conclusion that such a tax would be in violation of the provisions of the Federal Constitution."

A significant intimation in that direction is found in the recent case of *Cook* v. *Tait,* 265 U. S. 47. That case held that the Federal Government had power to impose exactly the kind of tax that we claim a state cannot impose, i. e., a tax on the income received by a citizen from property situated outside the jurisdiction. In so holding, however, the Court was careful to draw a distinction between national power and the power of a State. The Court said (at p. 55):

> "We may make further exposition of the national power as the case depends upon it. It was illustrated at once in *United States* v. *Bennett* by a contrast with the power of a State. It was pointed out that there were limitations upon the latter that were not on the national power. The taxing power of a State, it was decided, encountered at its borders the taxing power of other States and was limited by them. There was no such limitation, it was pointed out, upon the national power."

This language must, of course, be taken as referring to the question before the Court, i. e., the right to tax a resident on income from property situated outside the jurisdiction, otherwise it would be meaningless. That it was not a

random remark is clearly indicated by the opinion in *Burnet* v. *Brooks,* 288 U. S. 378, decided in March, 1933, where the Court, speaking through Chief Justice HUGHES, said (at p. 405):

> "This distinction between the limitations of state jurisdiction to tax and the broad authority of the Federal Government, was restated *and applied* in Cook v. Tait, 265 U. S. 47, 55, 56." (Italics ours.)

This Court has frequently decided, in cases involving taxes of other kinds, that the State of residence cannot reach by taxation, directly or indirectly, tangible property situated in another State.

In *Delaware, L. &c. R. R. Co.* v. *Pennsylvania,* 198 U. S. 341, it was held that a tax on the value of the capital stock of a domestic corporation was in substance and effect a tax on the property in which that capital was invested, and that the value of tangible property situated outside the State must be excluded, otherwise the tax would amount to the taking of property without due process of law in violation of the Fourteenth Amendment.

In *Union Transit Co.* v. *Kentucky,* 199 U. S. 195, it was held that the State of Kentucky could not tax a resident (a domestic corporation) upon tangible personal property permanently employed without the State; that:

> "An attempt on the part of the State in which the owner is domiciled to tax such property amounts to a deprivation of property without due process of law within the purview of the Fourteenth Amendment" (headnote).

In *Frick* v. *Pennsylvania,* 268 U. S. 473, it was held that the State of domicile (Pennsylvania) had no jurisdiction for purposes of taxation over tangible personal property situated outside Pennsylvania, notably Mr. Henry C. Frick's collection of art objects housed in New York City. The Court held (headnote):

> "A state statute attempting to tax the transfer of tangible personal property having an actual situs in other States transcends the power of the State so attempting and contravenes the due process clause of the Fourteenth Amendment."

As the case at bar involves tangible property only, it would be beside the point to discuss the interesting line of recent decisions in which this Court has announced the rule applicable to intangibles, holding that under the maxim *mobilia sequuntur personam* they have their taxable situs and are subject to State taxation only at the domicile of the owner. See, e. g.:

> *Safe Deposit & T. Co.* v. *Virginia,* 280 U. S. 83, 92;
> *Farmers Loan Co.* v. *Minnesota,* 280 U. S. 204, 210;
> *Baldwin* v. *Missouri,* 281 U. S. 586;
> *Beidler* v. *South Carolina,* 282 U. S. 1;
> *First National Bank of Boston* v. *State of Maine,* 284 U. S. 312.

However, these cases, while not directly in point, are significant as indicating what the New Hampshire Court called "the logic of the later decisions"—a determination to do away as far as possible with double taxation as between the States.

The whole subject of the distinction between National and State power and the growth in respect of State power of the "rule of immunity from taxation by more than one State" are so well summarized in the opinion of Chief Justice HUGHES in the recent case of *Burnet* v. *Brooks,* 288 U. S. 378, that we venture to quote somewhat at length. That was a case affirming the right of the National Government to tax intangibles (securities and bank accounts) owned by a non-resident alien. The Court took occasion to survey the field

of Federal and State jurisdictions, saying *inter alia* (288 U. S., p. 401, *et seq.*):

> "The limits of State power are defined in view of the relation of the States to each other in the Federal Union. The bond of the Constitution qualifies their jurisdiction. This is the principle which underlies the decisions cited by respondents. These decisions established that proper regard for the relation of the States in our system required that the property under consideration should be taxed in only one State and that jurisdiction to tax was restricted accordingly. * * * The principle has had a progressive application. In *Louisville & Jeffersonville Ferry Co.* v. *Kentucky,* 188 U. S. 385, the question related to a ferry franchise granted by Indiana to a Kentucky corporation, which Kentucky attempted to tax. Despite the fact that the tax was laid upon a property right belonging to a domestic corporation, the Court held that the Fourteenth Amendment precluded the imposition. *Id.,* p. 398. In *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, the principle was applied to the attempted taxation by Kentucky of tangible personal property which was owned by a domestic corporation but had a permanent situs in another State. The Court decided that where tangible personal property had an actual situs in a particular State, the power to subject it to state taxation rested exclusively in that State regardless of the domicile of the owner. * * * The decision in *Farmers Loan & Trust Co.* v. *Minnesota, supra,* overruling *Blackstone* v. *Miller,* 188 U. S. 189, carried forward the principle by applying it to intangibles. The Court was of the opinion that 'the general reasons declared sufficient to inhibit taxation of them (tangibles) by two States apply under present circumstances with no less force to intangibles with taxable situs, * * *. But it has been as decisively maintained that this principle, thus progressively applied in limiting the jurisdiction of the States to tax, does not restrict the taxing power of the Federal Government."

In this case it is not necessary to attack the constitutionality of the New York Tax Law but only the construction sought to be put upon that statute by the Tax Commissioners. While the language of Section 351 imposing an income tax on residents ("entire net income") is general in form, it should, under well recognized principles, be construed as relating only to matters within the jurisdiction of the law-making body. Section 351 is not the only provision of the New York Tax Law where this principle of construction must be applied. For example, Section 3 provides that "all personal property situated or owned within this State" is taxable, and Section 8 provides that "every person shall be taxed in the tax district where he resides * * * for all personal property owned by him or under his control." The language of these two sections is general, but no one supposes that it covers tangible property having a definite situs outside the State. See, e. g., *Hoyt* v. *Commissioners of Taxes*, 23 N. Y. 224.

The State of New York taxes the income from all taxable lands within its borders, including land owned by non-residents (Tax Law, § 351). Ohio has like power. If New York can also tax the income from lands in Ohio a wide field is opened for double taxation.

As between Nation and State double taxation is often unavoidable, because the two sovereignties cover the same persons and properties. As between two States of the Union the situation is different. They have separate and distinct jurisdictions, as regards both persons and property. For one to invade a field of taxation belonging primarily to the other, such as income from the other's lands, works injustice. The justification for a tax affecting property lies in the protection afforded by the taxing State to the property taxed. New York affords no protection to real estate situated in Ohio, or to the securing of rentals therefrom.

Petitioners urge that such a tax involves no injustice. They say (Petitioners' Brief, Point III):

> "In the instant case, the taxpayer chooses to reside in New York and enjoy here the fruits of property which she owns in Ohio. She has no justifiable complaint because New York and Ohio each ask her to contribute to the costs of government, since New York protects her in her person and Ohio lends its protection to her property."

The evils of double taxation as between the States have increasingly engaged the attention of this Court. In *Farmers Loan Co.* v. *Minnesota* (280 U. S. 204), which formally overruled the famous *Blackstone* case (*Blackstone* v. *Miller,* 188 U. S. 189), the Court pointed out that, while it and similar cases had held in effect that two States may tax the same subject matter without conflict with the Fourteenth Amendment,

> "The inevitable tendency of that view is to disturb good relations among the States and produce the kind of discontent expected to subside after establishment of the Union."

IV.

The decisions relied on to support the tax are not in point.

In *Maguire* v. *Trefry,* 253 U. S. 12, it was held that the State of Massachusetts could tax one of its residents upon income from a trust held and administered in the State of Pennsylvania. The trust estate consisted of intangibles (bonds and equipment trust certificates) and the taxpayer's interest therein was clearly taxable under the rule of *mobilia sequuntur personam.*

In *Lawrence* v. *State Tax Commission of Mississippi,* 286 U. S. 276, it was held that the State of Mississippi could

tax one of its residents upon income from work (the construction of highways) done in the State of Tennessee. The Court pointed out that the source of the income, an intangible, was itself taxable, saying (at p. 281):

> "It would be anomalous to say that although Mississippi may tax the obligation to pay appellant for his services rendered in Tennessee * * * still, it could not tax the receipt of income upon payment of that same obligation."

In *Cook* v. *Tait,* 265 U. S. 47, it was held that the Federal government has power to tax the income received by a native citizen of the United States from property situated abroad. The decision was based on the power possessed by the Nation over its citizens. The opinion contrasts this power with the power of a State, pointing out that there are limitations on the latter that are not on the national power.

Peck v. *Lowe,* 247 U. S. 165, involved a Federal tax and was decided upon considerations of construction, not power, the Court holding that a general non-discriminatory tax on income from an exporting business was not a "tax or duty * * * laid on articles exported from any State" within the meaning of the Constitution.

In certain decisions involving a state income tax upon income from interstate commerce a distinction has been drawn between gross income and net income "after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose," and a tax upon the latter has been sustained (see e. g., *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321, 328). This distinction was discussed by Justice Holmes writing the opinion in *Gillespie* v. *Oklahoma,* 257 U. S. 501, and held to be based on considerations peculiar to interstate commerce. The Court went on to say (p. 505):

> "In cases where the principal is absolutely immune from interference"—and that is the situation

> of the Ohio real estate in the case at bar—"an inquiry is allowed into the sources from which net income is derived and if a part of it comes from such a source the tax is *pro tanto* void."

In *Shaffer* v. *Carter,* 252 U. S. 37, it is remarked (p. 57):

> "As to residents it (i. e., the State of Oklahoma) may, and does, exert its taxing power over their income from all sources, whether within or without the State," etc.

This remark was *obiter* and is no more authority for the proposition that a State may tax income from tangible property situated outside the State than it is for the proposition that a State may tax income from Federal salaries and Government bonds. Obviously, all the Court meant to say was that in the case of residents the State of Oklahoma taxes all income within the taxing power of the State, a proposition with which we have no quarrel.

Petitioners' brief quotes at length from *People ex rel. Central Union Trust Co.* v. *Wendell,* 197 App. Div. 131, affirmed without opinion 231 N. Y. 629. That decision is not in point, involving merely a question of statutory construction. Moreover, the opinion seems to support our position in this case. The Court said (197 App. Div. 135):

> "We are not unmindful that it has been held that a tax on income is in reality a tax on the property producing the income. (*Pollock* v. *Farmers' Loan & Trust Company,* 157 U. S. 581; 158 id. 601; *Hancock* v. *Singer Manufacturing Company,* 62 N. J. L. 289, 342; *Opinion of the Justices,* 220 Mass. 613, 623.) That might be important in reference to some questions, *as for instance if we were considering the legality of a tax on income, there being a constitutional prohibition against such tax on the principal.* Our problem here, however, is one of statutory construction," etc. (Italics ours.)

CONCLUSION.

The case should be dismissed for the want of a Federal question; or, if retained, the order and judgment of the Supreme Court of the State of New York should be affirmed.

Respectfully submitted,

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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1933. No. [redacted] 1

THOMAS M. LYNCH, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commissioners of the State of New York,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, upon the relation of ELIZABETH G. PIERSON,

Respondent.

MOTION ON BEHALF OF THE COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE,* AND BRIEF.

SETH T. COLE,
Counsel for Amicus Curiae.

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IN THE

Supreme Court of the United States

October Term, 1933. **No. 831.**

THOMAS M. LYNCH, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commissioners of the State of New York,

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THE PEOPLE OF THE STATE OF NEW YORK, upon the relation of ELIZABETH G. PIERSON,

Respondent.

MOTION ON BEHALF OF THE COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE.*

COME NOW, Henry F. Long, Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts, and move this Honorable Court for leave to file the annexed brief as *amicus curiae.*

SETH T. COLE,
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IN THE

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BRIEF ON BEHALF OF THE COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS AS *AMICUS CURIAE.*

Statement.

The question presented in this case for the decision of this Court is whether the State of New York in levying a personal income tax based upon the "net income" of a person domiciled therein may take into consideration, for the purpose of computing such "net income," income received by such person from real property owned by her and situated in another state of the United States.

Specifically, the facts are that Elizabeth G. Pièrson was domiciled in the State of New York (R. fol. 4) and was the owner of real property situated in the City of Cincinnati, State of Ohio (R. fol. 8), from which in the year 1928 she received rental income of $2,223.72 (R. fols. 8-9). In making her personal income tax return pursuant to Article 16 of the New York Tax Law, Mrs. Pierson set forth the fact of the receipt of this rental income but failed to include the same in her gross income, from which gross income certain deductions and exemptions specified in said Article were subtracted in arriving at her "net income" upon which the tax was imposed (R. Exhibit 2, side fols. 15 & 15-a). Thereafter, the State Tax Commission of the State of New York made an additional assessment of personal income tax against said rental income (R. Exhibit 4, side fols. 17 & 17-a), which additional assessment was paid under protest (R. fol. 6). This proceeding was instituted to review the additional assessment.

It was the view of the majority of the justices who decided this case in the Appellate Division of the Supreme Court of the State of New York for the Third Judicial Department that to tax the income of the Ohio real estate would be the equivalent in law of taxing the real estate itself. The New York Court of Appeals in affirming the decision at Appellate Division wrote no opinion so that we are without the benefit of the views of the judges of that Court.

ARGUMENT.

POINT I.

The statute of the State of New York assailed in this proceeding does not impose a tax upon real property of the relator situated in the State of Ohio and does not violate the provisions of the Constitution of the United States.

The claim of unconstitutionality seems to be predicated upon an infringement of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

At the outset it may be conceded that the State of New York has no jurisdiction over real property situated beyond its borders, and if the law under which the tax attacked in this proceeding was assessed does undertake to subject real property so situated to taxation, the enforcement of such law should be proscribed. This being so, it is important that the provisions of the statute be examined.

The tax was levied pursuant to Article 16 of the New York State Tax Law which imposes a personal income tax by the following language:

> "A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined * * *." (New York Tax Law, §351.)

The basis for the tax is "net income." "Net income," which is purely a statutory conception, is ar-

rived at by ascertaining the "gross income," which includes "gains, profits and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever, including gains or profits or income derived through estates or trusts by the beneficiaries thereof, whether as distributed or as distributable shares." Certain items of income are specifically excluded (New York Tax Law, §359). From the "gross income" so ascertained certain amounts are deducted, such as business expenses, interest, taxes, losses, bad debts, depreciation, exhaustion, contributions for charitable purposes, etc. (New York Tax Law, §360). Certain exemptions are then allowed (New York Tax Law, §362).

Even a casual examination of the provisions above referred to would seem to dictate the conclusion that the statute does not tax real property as such. It does not purport to impose a tax upon property of any nature as such, except as a person's "net income" may be regarded as a species of property.

The personal income tax has none of the characteristics of a real property tax. It is not based upon valuation. There is no provision whereby the tax is made a lien upon the property from which the income is derived and the obligation for its payment would

not follow the property in case of a sale or other disposition thereof. When it becomes necessary to enforce the tax, the law provides for proceedings only against the person of the taxpayer and his property within the State of New York (New York Tax Law, §§379, 380, 381). If the decision below be accepted the tax would not apply to all real property as no tax would be imposed upon non-revenue producing real property, or real property occupied by a taxpayer as a home or for business purposes. There would be no uniformity as to the rate of tax for this would depend not upon the amount of the rental income but upon the amount of all of the income of the taxpayer and also upon the amount of deductions and exemptions to which the taxpayer might be entitled. It may be safely asserted that the tax does not in any way resemble a real property tax.

The nature of the tax has been passed upon by the courts of New York State, and it has been decided that the tax is upon the individual, his income being used only as a measuring device.

In *People ex rel. Central Union Trust Co. v. Wendell*, 197 App. Div. 131, aff'd without opinion, 231 N. Y. 629, it was said (pp. 135-6):

> "The income tax is not directly at least imposed on any particular income. The recording tax is imposed on the mortgage (§253); the income tax is a tax on the individual. It is 'imposed upon every resident of the State' (§351). His income is used only in fixing the measure of such tax. It is the 'net income' on which the tax is computed (§351). The 'net income' means the 'gross income' of the taxpayer less legal deductions (§357) and in determining the 'gross income'

> mortgage interest as well as all other income is included with numerous exceptions specified in section 359. From such 'gross income' thus determined are to be subtracted numerous deductions (§360) and also certain exemptions (§362) before the tax is computed. Hence the income from any particular source is but one element to be considered in connection with other elements in determining the measure of the taxation which is imposed on the individual. In no proper sense may it be said that the tax is imposed on the interest of any particular mortgage. That is merely a factor in the determination of the amount of such taxation."

Necessarily the income from any given source completely loses its identity in the process of arriving at the "net income." Indeed, there is no certainty that a person having gross income which includes rental income from real property situated in another state will have any "net income" or will ever be called upon to pay any tax.

The history of the New York personal income tax is added evidence that the tax is not imposed upon real property. The law was passed in 1919 following the complete breakdown of the general property tax as applied to intangible personal property. Prior to that year, intangible personal property had been subjected to the same taxation as real property, but the rate of tax was so high as to be almost confiscatory of the income from securities, with the result that the law was not enforced and the tax became easy to dodge. The tax on income was intended to be a substitute for the tax on intangible personalty. The latter was expressly exempted from general property taxation (Section 352 of the Tax Law, as enacted by Section 1 of Chapter

627 of the New York Laws of 1919 and Section 3 of said Chapter). No change whatsoever was made in the tax on real property. Historically the personal income tax was not a real property tax but was a personal imposition.

The personal income tax of the State of New York is a tax levied upon persons domiciled in that State for the purpose of defraying the cost of government generally. It is based upon the "ability to pay" theory as distinguished from the "benefit" theory, which latter accounts to a large degree for the real property tax. The distinction between the real property tax and the personal income tax is also apparent when these taxes are related to the two great bases for taxation, viz., wealth and income. The real property tax is primarily a tax upon wealth as represented by valuation, whereas the personal income tax, as its name denotes, is in the true sense a tax upon income.

Every person has a free choice of domicile. If he or she chooses to establish a domicile in New York State, thus becoming entitled to and receiving all of the protection and benefits with which that State clothes its residents, it is manifest that such person should be required to contribute to the cost of maintaining the state and local government. What fairer method of measuring the contribution could be established than "net income"? Should a resident of the State of New York whose income is derived wholly from real property in other states be exempted from paying his or her share of the cost of government in that State when another resident having an identical income, not derived from real property outside the State, is required to pay?

A state might, if it chose, abolish all forms of taxation except the personal income tax and rely exclusively upon that for the cost of maintaining government. If this should happen and the decision below should be affirmed, it would be possible for persons domiciled in a state who derived their entire income from real property situated outside the state to enjoy all the fruits of the state government without contributing toward its cost. This would be a violation of the fundamental law implicit in the scheme of government, that those who enjoy its benefits shall contribute toward its maintenance, and a doctrine which would permit such a result ought not to be countenanced.

Domicile in itself has been held to establish a basis for taxation.

> *Lawrence v. State Tax Commission,* 286 U. S. 276.

If this be so, why may not the amount of the taxes based upon domicile be measured by ability to pay as represented by "net income"? A person who derives his income from real property in another state cannot obtain living accommodations, food, clothing, or anything else in the state of his domicile without paying for them out of that income, and there is no reason why such a person should be entitled to obtain the manifold benefits of government afforded by the domiciliary state without paying for them. As such a person's income regulates expenditures for every other purpose, so should it measure his contribution oward the cost of government.

A cogent summation of the point under discussion is found in the opinion in *Maguire v. Tax Commissioner,* 230 Mass. 503, where it was said (pp. 512-3):

> "The income tax is measured by reference to the riches of the person taxed actually made available to him for valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden. It is founded upon the protection afforded to the recipient of the income by the government of the Commonwealth of his residence in his person, in his right to receive the income and in his enjoyment of the income when in his possession. That government provides for him all the advantages of living in safety and in freedom and of being protected by law. It gives security to life, liberty and the other privileges of dwelling in a civilized community. It exacts in return a contribution to the support of that government measured by and based upon the income, in the fruition of which it defends him from unjust interference."

Another very clear statement of the nature of an income tax is contained in *Crescent Mfg. Co. v. Tax Commission*, 129 S. C. 480. The opinion in this case sets forth concisely the reasons why a personal income tax should apply to the entire income of a resident of the taxing jurisdiction without regard to the source from which such income is derived. The Court said (pp. 485-6):

> "The income tax is primarily a subjective tax imposing personal liability upon the recipient of the income. It proceeds fundamentally upon the theory that all residents and citizens of the State, whether natural persons or domestic corporations, should contribute to the public treasury in proportion to ability to pay, measured by the amount of net income from all sources. The State's jurisdiction to levy the tax is not referable to and dependent upon jurisdiction of the property or of the business operations from which the income is derived. The State has jurisdiction, for taxing purposes, of property and of business operations

conducted within its borders, regardless of whether it has jurisdiction of persons who own the property or operate the business. It can tax the property in the form of a direct *ad valorem* property tax or otherwise; it can tax the business operations in the form of a license tax or otherwise. If, therefore, an income tax is to reach a source of taxable ability, not already subject to taxation, through the property tax and the business tax (taxable resources of which the State usually avails itself fully), it must necessarily apply to income derived from sources beyond the State's jurisdiction to reach otherwise than through its jurisdiction of the person of the recipient. Further, if the basic theory of the income tax is valid—that the residents and citizens of the State, natural and corporate, of whom the State has personal jurisdiction should contribute to the public treasury in proportion to *ability* to pay, and that net income is a sound measure of such ability to pay—it would seem entirely clear that the resident or citizen of the State who gathers his income from beyond the State's borders is just as *able* to pay as the resident or citizen who derives his income from sources within the State. And, indeed, as will be hereinafter pointed out, from the standpoint of an equitable distribution of the State's tax burden, it is of more importance that the tax should apply to income derived from sources outside the State than that it should apply to income derived from sources and operations within the State. Necessarily therefore, the genuine income tax, such as the Federal income tax in force at the time of the passage of this Act, is a general personal income tax, applicable to the net income of the recipient from all sources."

The case also contains a very apt illustration of the result which would obtain if the decision below should be sustained by this Court. It was said (pp. 496-7):

"To illustrate: Here are two men, residents and citizens of the City of Chester, S. C. Each has a net income of $15,000.00. One derives his income from farms and mercantile operations in the State of South Carolina; the other derives his income from investments in land and from an interest in an insurance business conducted in the State of North Carolina. Both get the benefit of all that the government of the State, through expenditures from the public treasury for schools, roads, police protection, and the social and economic welfare of the people, can furnish. Under the construction of this Act approved in the Circuit decree, the citizen who derives his income from his farms and mercantile business within the State, in addition to paying into the treasury of the State a direct tax on his property, real and personal, a municipal license tax on his mercantile business, and a tax on his income to the Federal Government, must pay to the State as a tax on his net income ⅓ of the amount paid as income tax to the United States. But the other citizen of Chester, whose income of $15,000.00 is derived from sources outside the State, and who gets practically as much out of the State in the benefits of government as the other man, would have to pay for the support of that government *not one cent,* exclusive of his poll tax and, perhaps, a nominal street or road tax, etc. Between these two income earners or gatherers, an intent on the part of the Legislature to discriminate against and tax the citizen of the State who receives his income from sources and operations within the State and exempt the other is not to be readily implied. Why resort to an 'income' tax at all, if the burden thereof is to be borne exclusively by the class of the State's citizens who already pay the property and business taxes of the State? That the construction of the Act approved in the Circuit decree, which confines the application of the tax to income derived from operations and sources within the State, would work a serious and unjust discrimination against

> that class of the State's citizens and taxpayers, whose income is derived from local sources in favor of that large class of the State's citizens, natural and corporate, whose income in whole or in part is derived from operations and sources outside of the State, would seem to be sufficiently apparent."

From the standpoints of economics, equity, sound taxation and common sense, a state should have power to impose a net income tax upon persons resident within its borders, based upon the inclusion in gross income of all items of income received by the taxpayer, including rental income of real property situated outside the state. Only a narrow, legalistic argument can be made to the contrary, and such an argument ought not to find favor with this Court, unless it is founded upon a direct, clear, and unmistakable mandate of the Constitution.

THE DECISION OF THIS COURT IN *COOK V. TAIT*, 265 U. S. 47, CONTROLS THE ISSUE HERE PRESENTED.

In considering the above decision, it must be borne in mind that the question in the case at bar relates solely to the POWER of the State of New York to impose the tax, and that the courts below seem to have reached their decisions on one ground only, viz., that the tax is imposed upon the Ohio real estate, a taxable *res* which is beyond the jurisdiction of the State of New York.

The facts in *Cook v. Tait* were identical with the facts in the matter under argument, except that in the

former the taxing sovereignty was the United States of America and the income against which the tax was asserted was income from real property situated in a foreign country, whereas, in the latter, the taxing sovereignty is the State of New York and the income against which the tax is asserted is income from real property situated in another of the states of the American Union.

George W. Cook, the plaintiff in error, was a native citizen of the United States but a resident of Mexico, domiciled in the City of Mexico. His income was derived from real property situated and tangible personal property permanently located in Mexico. He contended that his income was not subject to the net income tax imposed by the United States Revenue Act of November 23, 1921, for the reason that the Congress had no power to impose a tax upon income received by a native citizen of the United States who was at the time when the income was received permanently resident and domiciled in the Republic of Mexico, when such income was derived solely from real and personal property permanently located at all times without the territorial jurisdiction of the United States and solely within the territorial jurisdiction of the Republic of Mexico. The same claim was advanced as is urged on behalf of Mrs. Pierson, that the power of taxation inherent in sovereignty is limited to the territorial jurisdiction of the sovereign, and an attempt to impose a tax upon property beyond that jurisdiction is void. An infringement of the due process clause of the Fifth Amendment of the Constitution of the United States was alleged. The decision of this Court sustained the tax. Can there be doubt but

that if the United States has power to tax the income of its citizen who is domiciled in a foreign country, such income being derived from real property situated in the foreign country, merely because the recipient of the income is a citizen of the United States, the State of New York has like power to tax the income of its own citizen, who is also domiciled within its jurisdiction, from real property situated in another state?

Let us now consider what was said in the opinion in the *Cook* case with respect to the limitations upon the power of a state that do not affect the national power. Of course, the statements in this regard were *obiter,* but it is not necessary to attack them on this ground alone. It was said that the taxing power of a state encounters at its borders the taxing power of other states and is limited by them, whereas there is no such limitation upon the national power.

If the State of Ohio had jurisdiction to impose a personal income tax upon Mrs. Pierson, measured by her "net income," such as the State of New York had by virtue of the fact that she had her domicile in the latter state, there would be a conflict between the taxing power of the State of Ohio on the one hand and the taxing power of the State of New York on the other, but inasmuch as the State of Ohio had no jurisdiction *in personam* there could, of course, be no conflict between its right to tax and the right exercised by the State of New York. Ohio's jurisdiction to tax was limited solely to a tax *in rem.* If New York were endeavoring to impose a tax *in rem* against the Ohio real estate, there would be no question of the lack of power so to do, but New York's tax is personal and

represents a charge to the taxpayer for the benefits of government enjoyed by her in the State of New York measured by her net income computed by taking into consideration her income from all sources.

If the decision below is to be affirmed, it must be found that New York has taxed real property situated in Ohio. No one would contend that the United States had power to tax real property situated in Mexico, or that its power to tax real property in that country was any greater than the power of the State of New York to tax real property in Ohio. Therefore, it inevitably follows that when the United States in the *Cook* case taxed the net income of its citizen, it was not taxing real property in Mexico, and it is just as inevitable that New York, when it taxed the net income of its resident, was not taxing real property in Ohio. The logic is inescapable, and the *Cook* case is positive authority to sustain the tax imposed by the State of New York.

The point just made was fully considered in the *Cook* case. This is evidenced by the opinion of the District Court reported in 286 F., at p. 409, where in speaking of the argument of the plaintiff, that a tax on income of real property is a direct tax and that one state may not tax real property in another, it was said (p. 412):

> "Upon the assumption that an income tax is a direct tax, and is levied upon property outside the United States, the plaintiff's reasoning is clear and simple. It is true that, if sound, it carries us farther than is necessary for a decision of this case, for apparently it would deny the right to tax so much of the income of a resident as comes from property located in foreign lands."

Could there be any question as to the power of the State of New York to tax its citizen and resident on net income computed by including in gross income income of real property situated in Mexico? Apparently not, because there could be presented no question of the taxing power of the State of New York encountering the taxing power of any other state of the Union. If New York would have the power to reach the income from real property situated in Mexico, no doubt could exist but that the tax was not imposed upon such real property, and, if the real property in Mexico would not be taxed, certainly a like tax with respect to income from real property situated in Ohio would not be a tax upon that real property.

See also:

Bowring v. Bowers, 24 F. 2d 918, certiorari denied, 277 U. S. 608.

Lawrence v. State Tax Commission, 286 U. S. 276, *supra.*

This case strongly supports the right of the State of New York to impose the tax. It holds that income from activities carried on outside the state of domicile may be taxed by that state. The decision is ample authority in principle to sustain the power of New York to tax, if indeed it is not controlling. Mr. Justice Stone, in delivering the opinion of this Court, said (pp. 279-81):

> "The obligation of one domiciled within a state to pay taxes there, arises from unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equably among those who en-

joy its benefits. Hence, domicile in itself establishes a basis for taxation. Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government. See *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 58; *Maguire v. Trefry*, 253 U. S. 12, 14, 17; *Kirtland v. Hotchkiss*, 100 U. S. 491, 498; *Shaffer v. Carter*, 252 U. S. 37, 50. The Federal Constitution imposes on the states no particular modes of taxation, and apart from the specific grant to the federal government of the exclusive power to levy certain limited classes of taxes and to regulate interstate and foreign commerce, it leaves the states unrestricted in their power to tax those domiciled within them, so long as the tax imposed is upon property within the state or on privileges enjoyed there, and is not so palpably arbitrary or unreasonable as to infringe the Fourteenth Amendment. *Kirtland v. Hotchkiss, supra.*

"Taxation at the place of domicile of tangibles located elsewhere has been thought to be beyond the jurisdiction of the state, *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194; *Frick v. Pennsylvania*, 268 U. S. 473, 488-489; but considerations applicable to ownership of physical objects located outside the taxing jurisdiction, which have led to that conclusion, are obviously inapplicable to the taxation of intangibles at the place of domicile or of privileges which may be enjoyed there. See *Foreign Held Bond Case*, 15 Wall 300, 319; *Frick v. Pennsylvania, supra*, p. 494. * * * the tax is imposed by Mississippi on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, regardless of the place where it is carried on. The tax, which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received. These are rights and privileges

> incident to his domicile in the state and to them the economic interest realized by the receipt of income or represented by the power to control it bears a direct legal relationship.
>
> * * * * *
>
> "We can find no basis for holding that taxation of the income at the domicile of the recipient is either within the purview of the rule now established that tangibles located outside the state of the owner are not subject to taxation within it, or is in any respect so arbitrary or unreasonable as to place it outside the constitutional power of taxation reserved to the state."

The doctrine that enjoyment of the privilege of residence within the State, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government becomes evanescent if a citizen may reside within a state and be exempted from all liability for sharing the costs of its government merely because his income happens to be derived from real property situated in another state.

THE DECISION OF THIS COURT IN *POLLOCK V. FARMERS' LOAN & TRUST CO.*, 157 U. S. 429, HAS BEEN MISCONSTRUED BELOW.

Perhaps there has been no case decided by this Court during its existence that has been productive of greater misunderstanding and has been more misconstrued than the *Pollock* case. While it may seem like carrying coals to Newcastle for counsel to endeavor to state to this Court the *ratio decidendi* of this case, in view of the extreme familiarity of the Justices with it, nevertheless the statement is ventured that the case does not hold that to tax the income of real prop-

erty is *ipso facto* to tax the real property itself, but merely decides that a tax upon the income of real property is a direct tax within the meaning of that term as used in section 2 of Article I of the Constitution. For that much the case is authority, but it is respectfully submitted that it is not authority for the decisions of the courts below.

The statement in the *Pollock* opinion that "An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income" (p. 581), which was relied upon in the opinion at Appellate Division and which constitutes almost the sole basis for the relator's argument, was a mere *dictum* of this Court, uttered forty years ago in one of the most bitterly contested cases that this Court has ever considered, and in the decision of which it divided five to four. Counsel will seek to demonstrate that this *dictum* has been completely annihilated in the intervening years, and it seems remarkable indeed that in the light of the present day conception of the taxing power it should be seized upon as determinative of so important an issue as that which this case presents.

The weight to be ascribed to this *dictum* must be admeasured by a consideration of the question that was before this Court. It is a simple matter to select particular words from an opinion and divorce them from their context in such manner as to give to them an entirely different meaning than was ever within the contemplation of the user.

The question in the *Pollock* case was (p. 558):

> "* * * whether a tax on the rents or income of real estate is a direct tax within the meaning of the Constitution."

It is at once apparent that the case did not involve the question at issue in this proceeding. There was no doubt of the right of the United States to tax the rental income of all of the real estate within its boundaries. The issue was the method of taxation—whether apportionment according to population was necessary, as it would be under the Constitution if it were a direct tax. The determination as to whether the tax was direct or indirect turned on whether it could be passed on by the taxpayer or had to be borne by him directly, *i. e.,* on the economic theory of direct *versus* indirect taxation. Hence, what was said concerning a tax on rents being a tax on the property was *obiter* and unnecessary to the decision.

There can be no better statement of the rule as to the weight to be given to *obiter* statements than is contained in *Cohens v. Virginia,* 6 Wheat. 264, which was quoted with approval at p. 574 of the *Pollock* opinion, viz.:

> " 'It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' "

It really is unnecessary to go beyond the *Pollock* case to find the limitation which has been placed upon what was there said. The case was reargued, the opinion on reargument being reported in 158 U. S., at p. 601. Chief Justice Fuller said (p. 618):

> "Our previous decision was confined to the consideration of the validity of the tax on the income from real estate, and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution; and the court went no farther, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct; * * *"

In summarizing, the real point of decision was brought out at p. 637, where it was said:

> "Our conclusions may, therefore, be summed up as follows:
>
> "*First.* We adhere to the opinion already announced, that, taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes."

The scope of the *Pollock* case, as related to the question at issue, was brought out in *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, in which it was contended that the Federal income tax statute passed after the adoption of the Sixteenth Amendment of the Constitution, which permitted the levying of an income tax, was invalid. Chief Justice White, who participated fully in the *Pollock* decision and who certainly understood that case as well as any one, wrote the opinion in the *Brushaber* case. In discussing the *Pollock* case, he said (pp. 16-7):

"Coming to consider the validity of the tax from this point of view, while not questioning at all that in common understanding it was direct merely on income and only indirect on property, it was held that considering the substance of things it was direct on property in a constitutional sense since to burden an income by a tax was from the point of substance to burden the property from which the income was derived and thus accomplish the very thing which the provision as to apportionment of direct taxes was adopted to prevent. * * * Moreover in addition the conclusion reached in the *Pollock Case* did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but on the contrary recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it."

This shows clearly that all this Court did in the *Pollock* case was to determine that a tax upon the income of real property would be a violation of the intent of the framers of the Constitution if it were levied without apportionment. That was far different from laying down the principle that a tax upon the income of real property is a tax on such real property in the sense that if jurisdiction to tax the real property is wanting a tax upon net income must be levied by wholly disregarding the income from the real property.

In *Young v. Illinois Athletic Club,* 310 Ill. 75, at p. 80, the point of the decision in the *Pollock* case was succinctly stated as follows:

> "In the *Pollock case,* which is strongly relied on by appellant, the question before the court was whether or not a tax on the rentals derived from real estate is a direct tax. The decision of that case related to the constitutional powers of Congress to pass an income tax law, and it was held that such taxation was direct and not indirect within the meaning of the constitution, and the Income Tax law was therefore held unconstitutional. But the court, as indicated by the language in its opinion on rehearing (158 U. S. 601), 'went no further as to the tax on the income from real estate than to hold that it fell within the same class as the source whence the income was derived,—that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct.' The issue arising in the *Pollock cases,* therefore, was not whether an income tax was a tax on real estate or an interest therein, but whether such tax based on rentals was a direct tax and therefore within the prohibition of the constitution."

Also, in *Diefendorf v. Gallet,* 51 Ida. 619, it was said (p. 628):

> "Defendant makes the broad general contention that income from whatever source derived is property for the purpose of taxation, and that a tax thereon is a property tax. Principal stress is laid, however, upon the charge that a tax upon income derived from property, such as rent, interest, etc., is a tax upon the property itself, which is unconstitutional because not laid uniformly according to value, and that the entire act must fail if power to tax income from property be denied. Defendant relies principally upon certain language of the majority opinion in *Pollock v. Farmers' Loan & Trust Co.,* 157 U. S. 429, 15 Sup. Ct. 673, 39 L. ed. 759, which, if taken out of the

context and without reference to the immediate objects of that action, incline towards his position. It is to be remembered, however, that the Pollock case only decided that a tax upon the income from property was such a direct tax as had to be apportioned under the existing provisions of the federal Constitution. We can best place the Pollock case in true balance by referring to the later case of *Brushaber v. Union Pac. R. Co.*, 240 U. S. 1, Ann. Cas. 1917B, 713, 36 Sup. Ct. 236, 60 L. ed. 493, L. R. A. 1917D, 414, wherein the court said:

" 'Moreover in addition, the conclusion reached in the Pollock Case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but, on the contrary, recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone, and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it.'

"The Pollock case is also distinguished in *Featherstone v. Norman*, 170 Ga. 370, 70 A. L. R. 449, 153 S. E. 58, and in *Sims v. Ahrens*, 167 Ark. 557, 271 S. W. 720."

It is believed that what has been said establishes that the *Pollock* case is not authority for the proposition that a tax upon net income arrived at by including rentals from real property in gross income is a tax upon such real property.

Certainly, the settled law of New York is that a tax on rents of real property is not a tax on the real property itself. *Van Rensselaer v. Dennison*, 8 Barb. 23,

is a leading case on this point. The question decided was whether a tax on rents reserved in a lease constituted a tax on the granted premises.

The case was decided by the Albany General Term. It was said (p. 26):

> "It was a tax on rents issuing out of the granted premises, but in no sense, I think, a tax on the 'granted premises.'"

That case might also be regarded as prophetic with respect to the issue in the case at bar, for it was also said (p. 27):

> "It was the income of the person which was taxed, at a uniform value, prescribed by the statute. Suppose a general income tax should be laid, and the plaintiff in this case should be assessed for his whole income; could he collect a part of the tax from the defendant, under this covenant, because a portion of his income was rent of the defendant's farm? I think not; nor do I see how the cases would differ in principle. In both it would be a tax on the income alone."

To the same effect is the decision in *Brainard v. N. Y. C. R. R. Co.*, 242 N. Y. 125, where a railroad company had contracted with another railroad company that the latter should operate its road and share the gross earnings, the operating company having been required to pay all taxes and assessments which might be levied or become chargeable on the road or property, or upon the owning company, by reason of its ownership, and the question was whether the operating company was liable to pay the income taxes of the owning company based upon its share of the gross earnings. It was held that the operating company was not liable.

THE LAW OF MASSACHUSETTS

In *Codman v. American Piano Co.*, 229 Mass. 285, a lease contained a covenant that the lessee should pay "all taxes and assessments whatsoever which may be payable for or in respect of the leased premises during the term thereof". The lessor was required to pay a Federal income tax on an assessment computed upon the basis of the inclusion of the rent for the demised premises in gross income, and sought to recover from the lessee so much of said tax as was attributable to the rent, claiming that the tax on the rental income was a tax on the property leased and citing the *Pollock* case as authority. The Court dismissed this contention and held that the lessee was not liable. The opinion contains reasoning which so strongly supports the position taken in this brief that the liberty of quoting from it rather copiously will be taken. It was said (pp. 288-91):

> "The case of *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, dealt with the federal income tax law of 1894, and decided that a tax levied upon rents or income received from real estate was a direct tax and was unconstitutional because not levied in accordance with the constitutional rule of apportionment. In coming to the conclusion that a tax upon the rents or the income from real estate was a direct tax, the Court said at page 581, 'An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income.' Accordingly it was held that a tax upon such rents was as much a direct tax as a tax upon the land itself.
>
> "When the case was heard in re-argument, 158 U. S. 601, the previous decision on this point was reaffirmed in the following language at page 637: 'We adhere to the opinion already announced,

that, taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes.'

"The decision in the Pollock case that a tax on rents of real estate is a direct tax, and that therefore the federal income law which provided for a tax upon such rents was unconstitutional, related only to the constitutional power of Congress to tax incomes. The court did not consider or decide that a tax on rent was a tax for or in respect to the premises from which the rent was derived. That is a wholly different question.

"On rehearing of the Pollock case the court at page 618 expressly limited its judgment in the following words: 'Our previous decision was confined to the consideration of the validity of the tax on the income from real estate, and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution; and the court went no further, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct.' Neither the Suter case nor the Pollock case decides the question presented in the present case, and therefore do not support the plaintiffs' contention.

"When rent from land has become due, it is personal property; it is a chose in action and does not pass by a conveyance of the land. *Burden v. Thayer,* 3 Met. 76.

"If a lessor dies during the term, the rents accrued during his lifetime are personal property and pass to his administrator, while rents that accrue after his death go to his heirs, or to whoever may be entitled to the real estate subject to the demise. *Clark v. Seagraves,* 186 Mass. 430, 439.

"So rent from real estate which has accrued is held to be taxable at the domicil of the lessor. *Old Dominion Steamship Co. v. Virginia,* 198 U. S. 299 while the real estate from which rent is derived is

taxable at its *situs*. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194.

"In this Commonwealth taxes upon real estate are assessed to the owner or person who is in possession on the first day of April, St. 1909, c. 490, Part I, §15. St. 1914, c. 198, §2. St. 1915, c. 237, §23.

"In determining whether the language of the covenant in the lease in question is sufficiently comprehensive to impose upon the lessee the obligation to indemnify the lessors who have paid the taxes under the tariff act of 1913 depends upon the construction of the phrase 'for or in respect of the said leased premises.' These words are to be interpreted in accordance with their natural and ordinary meaning. Manifestly taxes upon the real estate come within the terms of the covenant. It is equally clear that taxes for betterment assessments under such a covenant would have to be paid by the lessee unless otherwise stipulated in the lease.

"On the other hand, we cannot construe the phrase in question as including within its terms a tax assessed by the federal government to the lessor upon the rents reserved under the lease. Such an assessment is upon an entirely distinct kind of property than is the assessment upon the real estate. While under the federal income tax law a tax on rent is a tax on land and so a direct tax, yet a tax on land is not a tax on rent; the defendant did not covenant to pay taxes for or in respect of the rent; his undertaking is to pay the taxes for or in respect to the premises. The covenant obligated the lessee to pay the taxes upon the real estate but not upon the income in the form of rent which arose therefrom.

"In construing the covenant, it is plain that taxation upon real estate means one thing, and taxation upon income means another.

"Under a covenant in a lease substantially like that under consideration, it was held that it did not include a tax upon the rent reserved.

Van Rensselaer v. Dennison, 8 Barb. 23.

> "In *Woodruff v. Oswego Starch Factory,* 70 App. Div. (N. Y.) 481, affirmed in 177 N. Y. 23, it was held that it would not be a natural or reasonable construction of a similar covenant to interpret it as including a tax upon the rents reserved under the lease. In that case the court uses this language: 'Plaintiffs would be assessed in respect of the demised premises, and it would become the duty of the defendant to protect them and the premises against such assessment by paying the tax thereon. But when we pass beyond this class of assessments and assume one made against the lessor upon his income or rents received under a lease, and otherwise in no manner based upon or measured by the lands leased, their value, character or condition, it seems to us that it would be a strained construction to say that such tax was on account of, relating to, or "in respect" of, the demised premises, within the meaning of the covenant.' *Codman v. Johnson,* 104 Mass. 491. *Twycross v. Fitchburg Railroad,* 10 Gray, 293."

It must be remembered, as heretofore stated, that the question at issue here is one of power to tax, and does not permit of fine distinctions of legal reasoning concerning the incidence of the tax or its effect. If New York has power to tax its resident on net income arrived at by including the Ohio rentals in gross income, it makes no difference at all that from certain points of view the tax may be considered as affecting the real property in Ohio. In order to prevail, relator must establish that when New York taxes the net income it taxes the real estate in Ohio.

CASES IN OTHER STATES

Young v. Illinois Athletic Club, 310 Ill. 75, *supra,* involved the question of whether an income tax on the

rental income of real estate is a tax on the real estate. In holding that it was not, the Court said (p. 83):

> "Such tax is not a tax against the real estate * * *"

It was also said (p. 81):

> "An income tax is an assessment upon the income of the person and not upon any particular property from which that income is derived."

Also (p. 82):

> "No case has been cited, and we are unable to find one, holding that an income tax is a tax on an interest in land; and the nature of the tax itself, which is a tax made on the net income of the individual, is such as to preclude the idea of a tax against property."

The reasoning of the Illinois court in the case last cited is clear and concise, and the Court is respectfully referred to the opinion in said case for substantiation of the position taken in this brief.

In *Park Bldg. Co. v. Yost Fur Co.*, 208 Mich. 349, after considering a contention based on the *Pollock* case that a tax on rental income was a tax on the real estate, the Court said (p. 361):

> "Whether direct or indirect, the lessor's income tax as applied to this leased property is not a tax 'levied upon said premises,' or on any of the four estates named in the lease, but is in its process of levy and assessment a direct personal tax against him, inseparable from him and his annual income, beginning and ending with him."

See to the same effect,

Catawissa R. R. Co. v. Philadelphia & Reading Ry. Co., 255 Pa. St. 269.

Still another case which contains very lucid reasoning establishing that a tax on rental income is not a tax on the real property from which such income is derived is *State v. Wisconsin Tax Commission,* 166 Wis. 287, in which it was said (p. 290):

> "Much confusion of thought arises from regarding the income tax as a tax that is levied upon or attaches to property as such, irrespective of the person sought to be taxed. It is the recipient of the income that is taxed—not his property,—and the vital question in each case is, Has the person sought to be taxed received an income during the tax year? If so, such income, unless specifically exempted, is subject to a tax though the property out of which it is paid may have been exempt from an income tax in the hands of the payor. It is the relation that exists between the person sought to be taxed and specific property claimed as income to him that determines whether there shall be a tax. If the person sought to be taxed is the recipient during the tax year of such specific property as income in its ordinary significance, then the person is taxed. But the tax is upon the right or ability to produce, create, receive, and enjoy, and not upon specific property. Hence, the amount of the tax is measured by the amount of the income irrespective of the amount of specific property or ability necessary to produce or create it. In the ordinary acceptation of the term this may be said to be a tax upon income as the statute denominates it. But the tax does not seek to reach property or an interest in property as such. It is a burden laid upon the recipient of an income."

UNION REFRIGERATOR TRANSIT CO. V. KENTUCKY, 199 U. S. 194

This case had to do with a tax on railroad cars, and it was held that the State of Kentucky could not tax such cars when the same were not within its jurisdic-

tion. One of the reasons assigned for denying the right to tax in that case is available to sustain the right to tax here. It was there said (p. 204):

> "It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation."

It cannot be said in this case that Mrs. Pierson has not received the protection for which the New York tax is supposed to be the compensation. She has had all the protection which that State gives to its residents and should pay for it. A tax on her net income is not compensation for protection accorded to the real estate in Ohio.

It should be noted that the case under discussion especially reserved the question of the taxability of income from real property and tangible personal property having its situs without the boundaries of the taxing state, this Court saying (p. 204):

> "True, a resident owner may receive an income from such property, but the same may be said of real estate within a foreign jurisdiction. Whatever be the rights of the State with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived."

OTHER CASES

In *Kirtland v. Hotchkiss,* 100 U. S. 491, the issue was very close to that in the case at bar. Connecticut had taxed one of its residents on bonds secured by

mortgages of real property in Illinois, the bonds being kept in the latter state. It was claimed that this was taxing property not within the jurisdiction of Connecticut. This Court said (p. 498):

> "The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow-citizens of the same State, to contribute for the support of the government whose protection he enjoys."

Also, at p. 499:

> "Whether the State of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds, or stocks which they may own" [or, may we not interpose, by the amount of the income which they receive] "(other than such as are exempted or protected from taxation under the Constitution and laws of the United States), is a matter which concerns only the people of that State, with which the Federal government cannot rightly interfere."

In considering the *Kirtland* decision, consideration must be given to the fact that a mortgage on real property has been held to be an interest in it and taxable where the land is situated, even though the owner be a nonresident of the jurisdiction. See *Savings & Loan Society v. Multnomah County*, 169 U. S. 421.

In *Shaffer v. Carter*, 252 U. S. 37, 52, it was said:

> "* * * a State may impose general income taxes upon its own citizens and residents whose persons are subject to its control."

This again brings out the thought that the tax is a personal tax.

Former Chief Justice White of this Court considered a net income tax as being generically an indirect tax. In *Stanton v. Baltic Mining Co.*, 240 U. S. 103, he said (p. 113):

> "In other words, we are here dealing solely with the restriction imposed by the Sixteenth Amendment on the right to resort to the source whence an income is derived in a case where there is power to tax for the purpose of taking the income tax out of the class of indirect to which it generically belongs and putting it in the class of direct to which it would not otherwise belong in order to subject it to the regulation of apportionment."

Maguire v. Trefry, 253 U. S. 12, also is in point. The tax there laid was upon the income of a Massachusetts resident from intangibles held in trust in Pennsylvania by a Pennsylvania trustee. Under the rule laid down by this Court in *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83, Massachusetts had no greater power to tax these intangibles than it would have had to tax real property in Pennsylvania, as the *Pollock* case also held that a tax on the income of personal property was a tax on the property itself in the sense that it was a direct tax within the meaning of the Constitution. If relator's argument is correct, it would seem that this Court erred in deciding that Massachusetts did have power to tax the income from these intangibles.

It is recognized that in the *Safe Deposit & Trust Co.* case, as well as in the *Maguire* case, it was brought

out that there is a sufficient distinction between the equitable and legal ownerships in intangibles to permit the taxation of the former at the domicile of the owner thereof, whereas the legal ownership may not be there taxed because the property is in the hands of a trustee in another state. With this principle in mind, it does not seem that there ought to be any difficulty about the taxation at a person's domicile of his net income based in part upon income from foreign real property. The legal interests protected and taxed by Pennsylvania and Massachusetts in the *Maguire* case were different, and this was sufficient to sustain taxation by both states. By the same reasoning the tax at bar may be sustained, as the legal interests protected and taxed by Ohio and New York are entirely different.

The New York tax is no more of a tax on the Ohio real estate than is a tax on the net income of a corporation derived from exporting goods from the State a tax on the articles exported. See *Peck & Co. v. Lowe,* 247 U. S. 165.

It is fundamental that a state may not impose a tax on receipts from interstate commerce, because such a tax would tend to regulate or burden such commerce in violation of the commerce clause of the Constitution. Nevertheless, a net income tax computed by including such receipts in gross income is not offensive. *United States Glue Co. v. Oak Creek,* 247 U. S. 321. The same principle is invoked here.

In *Bates v. Boston,* 5 Cush. 93, at p. 99, Chief Justice Shaw said:

> "The assessment does not touch the fund, or control it; nor does it interfere with the trustee in the exercise of his proper duties; nor call him, nor hold him, to any accountability. It affects only the income, after it has been paid by the trustee."

So, here, the assessment on relator's net income made by the State of New York does not touch the Ohio real estate, or control or interfere with it, or hold it to any accountability. It affects only the income after it has been paid over.

The New York tax is not levied, and in the nature of things a net income tax cannot be, until the expiration of the taxable year and after the income has been reduced to the possession of the taxpayer. By that time it has lost any distinctive character that it may have had, whether as rent of real property or what not, and is incorporated into the mass of the taxpayer's estate at his domicile.

If the net income tax were aimed at income from foreign realty, a different question might be presented (*Miller v. Milwaukee*, 272 U. S. 713), but a careful study of the New York personal income tax act fails to give any indication of a purpose to reach the income of foreign real estate as a special or distinct subject of taxation.

The State of New York, by its personal income tax act imposing a tax based upon "net income", has asserted no jurisdiction of any kind over the real estate owned by the relator situated in the State of

Ohio, and has imposed no tax upon it. This being so, it has violated no right of the relator guaranteed by the Constitution of the United States, and the decision below should be reversed by this Court.

Respectfully submitted,

SETH T. COLE,

Counsel for Henry F. Long, Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts, as Amicus Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 1.—October Term, 1934.

Thomas M. Lynch, John J. Merrill and John P. Hennessey, as Commissioners constituting the State Tax Commissioners of the State of New York, Petitioners, *vs.* The People of the State of New York upon the relation of Elizabeth Pierson.	On Writ of Certiorari to the Supreme Court of the State of New York.

[November 5, 1934.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The State Tax Commission determined that rental received by the relator, a resident of the State of New York, from real property situated in the State of Ohio, should be included as a part of relator's income for the purpose of computing her income tax under the Tax Law of New York. The relator sought review by the Supreme Court of New York, invoking rights under the Constitution and laws of the State of New York and under the Fourteenth Amendment of the Constitution of the United States. The Appellate Division of the Supreme Court, Third Department, annulled the determination of the State Tax Commission. 237 App. Div. 763. That Court, while citing decisions of this Court under the Fourteenth Amendment, did not state that its decision rested upon the application of the Constitution of the United States. The Court of Appeals of the State affirmed the order of the Appellate Division, but without opinion (263 N. Y. 533), and the grounds of its decision are left to conjecture. It may be surmised, from the quotations in its opinion, that the Appellate Division intended to rest its decision upon a determination of the application of the Fourteenth Amendment, and that the affirmance by the Court of Appeals went upon the same ground, and not upon the non-federal ground of the application of the Constitution and

laws of the State. But jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record.

It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. *De Saussure* v. *Gaillard,* 127 U. S. 216, 234; *Johnson* v. *Risk,* 137 U. S. 300, 306, 307; *Wood Mowing and Reaping Machine Co.* v. *Skinner,* 139 U. S. 293, 295, 297; *Eustis* v. *Bolles,* 150 U. S. 361, 366, 367; *Whitney* v. *California,* 274 U. S. 357, 360, 361; *Mellon* v. *O'Neil,* 275 U. S. 212, 214. Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. *Allen* v. *Arguimbau,* 198 U. S. 149, 154, 155; *Johnson* v. *Risk, supra; Wood Mowing and Reaping Machine Co.* v. *Skinner, supra; Consolidated Turnpike Co.* v. *Norfolk & Ocean View Railway Co.,* 228 U. S. 596, 599; *Cuyahoga Power Co.* v. *Northern Realty Co.,* 244 U. S. 300, 302, 304.

Petitioners have made no effort to obtain an amendment by the Court of Appeals of its remittitur, and although, on the oral argument in this Court, attention was directed to the practice in New York to entertain, in proper cases, an application for such an amendment in order to show appropriately the basis of the determination of the state court, no request was made for a continuance to permit such an application.

As the record fails to show jurisdiction in this Court, the writ of certiorari is dismissed as improvidently granted.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.